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THE

LAW REPORTS.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOL. V.—1877-8.

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1878.

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1878.

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IN

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LAL SHUNKUR BUX . . . . . PLAINTIFF;

AND

RANEE JANKI KOER . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF RAI BAREILI, OUDH.

AND

LAL SEETLA BUX . . . . . PLAINTIFF;

AND

RANEE JANKI KOER . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, OUDH.

Oudh Taluka—Sunnud to Widow and her Heirs—Separate Property of Widow —Act I. of 1869, *s.* 22, *cl.* 11.

A sunnud of a taluka in *Oudh*, which had been previously confiscated by Government, was granted, with full power of alienation, to the widow of the last owner, a Hindu, and to her heirs for ever, her name being entered

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH.

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in the first and second lists under Act I. of 1869, s. 8, one condition of the grant being expressed to be that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture:—

Held, in suits against the widow's daughter, that the sunnud conferred upon the widow and her heirs male the full proprietary right and title to the estate, and not merely an estate for life with remainder to the male heirs of her husband in the event of her dying intestate without having alienated it in her lifetime:

Held, also, as regards succession, that the limitation in the sunnud was wholly superseded by Act I. of 1869, and that the rights of the parties claiming by descent must be governed by sect. 22 of that Act, the provisions of which are not controlled in any way by sect. 3 and sect. 4 thereof:

Held, that, under clause 11 of sect. 22, the above taluka, which was the separate property of the widow, descended, in the absence of a proved custom of her tribe to the contrary, to her daughter in preference to the son of the daughter of a rival widow, and the remote male heirs of her husband.

THE three appeals above-mentioned related to the right to succeed to the taluka of *Dingwas* or *Pawansi*, as heir or in succession to the deceased talookdar and sunnud holder, *Kablas Koer*, widow of *Mypal Singh*.

The circumstances out of which the three suits arose are sufficiently detailed in the judgment of their Lordships. They were brought in the Court of the Deputy Commissioner of *Pertabghur*, who dismissed the two first-named suits, but gave to the Plaintiff *Seetla Bux* a decree declaring him entitled to succeed as prayed. An appeal in each case was brought, in the first two cases by the Plaintiffs, and in the third by the Defendant, to the Commissioner of *Rai Bareili*, who confirmed the decision of the lower Court in the two first-named suits, and reversed it in the third suit, thereby directing all three suits to stand dismissed. Thereupon an appeal lay direct to Her Majesty in Council in respect of the first two suits in which two concurrent decrees had been passed. In the third suit an intermediate appeal lay to the Court of the Judicial Commissioner, who affirmed the Commissioner's reversal of the lower Court's decree, and confirmed the order of dismissal.

The sunnud referred to in the judgment printed below was as follows:—

"(Sd.) *G. U. Yule*, Offg. Chief Commr.

"To *Thakurain Kablas Koer.*

"Know all men, that whereas by the proclamation of March,

1858, by His Excellency the Right Honourable the Viceroy and Governor-General of *India*, all proprietary right in the soil of *Oudh*, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased. I, *George Udney Yule*, Officiating Chief Commissioner of *Oudh*, under the authority of his Excellency the Governor-General of *India* in Council, do hereby confer on you the full proprietary right, title, and possession of the estate of *Dingwas*, in zillah *Pertabghur*, consisting of the villages as per list attached to the kubulyat you have executed, of which the present Government revenue is Rs.39,713. Therefore this sunnud is given you in order that it may be known to all whom it may concern, that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms, destroying all forts, preventing and reporting crime, rendering any service you may be called upon to perform, and of shewing constant good faith, loyalty, zeal, and attachment to the British Government, according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs.

"It is another condition of this grant, that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest male heir, according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption to whomsoever you please.

"It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your heirs as proprietor of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

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After the passing of the *Oudh Estates Act*, in 1869, the name of *Kablas Koer* was, in pursuance of the provisions of the 8th, 9th, and 10th sections of that Act, inserted and published in the "Lists of Talukdars and Grantees," numbered 1 and 2.

Cowie, Q.C., and *Cowell*, for the Appellant *Brij Indar Bahadur Singh*, contended that on the proper construction of the sunnud *Kablas Koer* took only an ordinary estate of a Hindu widow in the taluka thereby granted, together with a power of alienation, failing the exercise of which the taluka would go to her husband's heirs. In other words, the sunnud did not confer on *Kablas Koer* an absolute estate, but only as representing her husband, with succession to his male heirs, as those terms are interpreted by Act I. of 1869. Though the granting of the sunnud was an act of grace, it was not an arbitrary act of grace. A sunnud in favour of *A.* may be affected by evidence of a trust in favour of *B.*: see *Musst Thukrain Sookraj Kooar* v. *The Government* (1); *Widow of Shunker Sahai* v. *Rajah Kashi Persad* (2); *Ranee of Chillaree* v. *The Government of India* (3). Its intention was to confirm *Kablas Koer* in possession of the estate which she held as widow of *Mypal Singh*, in trust ultimately for the heirs of the husband. With regard to Act I. of 1869, sect. 22, the provisions of that section must be read in conjunction with sect. 3 of that Act and the terms of the sunnud. They were intended to define and explain, and not to repeal the course of inheritance prescribed by the sunnud. Moreover, the general object of those clauses was to keep up lineal male descent. The Appellant is, amongst the parties to these appeals, clearly the nearest male heir to *Mypal Singh* and also to *Kablas Koer* under the ordinary law referred to in clause 11, and there is no evidence of the existence of any nearer heir, of whose rights the Respondent in possession might avail herself. Assuming that *Kablas Koer* took this taluka under the grant as her stridhana, still the Appellant is her nearest male heir, and would therefore succeed, the Respondent being excluded by virtue of her sex under the terms of the sunnud, confirmed by the provisions of the Act. See *Srikrishma's* notes to the Dayabhaga, c. iv. p. 100;

(1) 14 Moore's Ind. Ap. Ca. 112, judgment of Lord Justice *James*.
(2) Law Rep. 4 Ind. Ap. 198.
(3) Ibid. 208.

where the grandson of contemporary wife means her daughter's son. See also the Dayabhaga, c. iv. sec. 3, pars. 31, 32, 33, 34; Mitakshara ii., c. xi., ss. 4, 8, 9, 11, 18, 22.

Joshua Williams, Q.C., and *Graham*, for the Appellant, *Lall Shunkur Bux*, also contended that it was not the intention of the Government of *India* by the terms of the sunnud to change the course of descent of the taluka into a different channel, but simply to assure to *Kablas Koer*, as widow and heiress of her husband, the possession of the estate which she had received at his death, and to secure as far as possible the transmission of the estate to the eldest male heir of the family. The object of sects. 21, 22 of Act I. of 1869, is to establish limitations in the nature of a strict settlement in favour of a single heir in the male line of the family of the talukdars. The ultimate remainder is by the clauses of sect. 22 granted to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of the talukdar were subject. Under and by virtue of those limitations, *Shunkur Bux*, who was the eldest male heir of *Lall Mypal Singh* (*i.e.* eldest son of the collateral heir, eldest in age though not by elder wife), was entitled to succeed to the inheritance on the death of *Kablas Koer* and the failure of the prior estates. The words "nearest male heir," in the sunnud must be construed in accordance with English law: see *Co. Litt.* 25 a, Book 1, c. 2, sect. 24. The sunnud must be construed in reference to the occasion of granting it; and the heirs of the grantee in this sunnud must be the heirs of her husband. The following cases were cited: *Yem* v. *Edwards* (1); *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (2); see also *Strange's* Hindu Law, vol. i. p. 246, cited by Sir *R. Palmer*, in *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (2). Reference was also made to *Syms's Case* (3) as an instance of a grant to a man and his heirs being construed in reference to the subject of the grant; and to *Rabutty Dossee* v. *Sibchunder Mullick* (4). Then as regards Act I. of 1869, it must be

(1) 1 De G. & J. 598; 3 K. & J. 564.
(2) 11 Moore's Ind. Ap. Ca. 139.
(3) Co. Rep. Part viii. 51a–55a.
(4) 6 Moore's Ind. Ap. Ca. 1.

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construed so as not to contradict the sunnud more than was necessary. Sect. 23 carefully includes males and excludes females. The intention of the Act was to exclude females altogether, except on failure of najib-ul-turfain. The evidence in the record of a custom in the family to exclude females from succession was discussed; and reference was made to *Musst Thukrain Sookraj Koer* v. *The Government* (1); *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2); *Strange's* Hindu Law, vol. i. p. 192.

Mayne, and *Thomas*, for the Appellant, *Lal Seetla Bux*, also contended that the person to succeed must be the heir of *Mypal Singh*, otherwise that the heir of *Kablas Koer* is the identical person who would have been heir to *Mypal Singh*. The grant of the sunnud to a Hindu widow, with the condition that the estate should descend to the nearest male heir, in the event of her dying intestate, made at a time when she had not and could not possibly have any male issue, and in the lifetime of her daughter, the Respondent, must have contemplated the exclusion of that daughter from inheritance under the ordinary law. Moreover, the condition was in accordance with the custom of the family, whereby daughters are excluded from the inheritance, and was confirmed by Act I. of 1869, which makes no provision for the succession of daughters, but impliedly and intentionally excludes them.

This talukdary in the hands of *Kablas* was not stridhun at all, and the line of succession to stridhun, is a line peculiar to certain specified classes of property. To all her property not comprised within those classes, such a property purchased by her not out of stridhun, her heir is the same person as the heir of her husband. Reference was made to Menu, c. 9, ss. 8, 45, c. 1, s. 38; Dayabhaga, c. 4, s. 1; Mitakshara, c. 2, s. 11, §§ 1 & 2; also c. 1, s. 1, § 8. *Katama Natchiar* v. *The Rajah of Shivagunga* (3). Property acquired by inheritance has been held not to be stridhun: see Dayabhaga, c. 4, s. 1, cl. 13. [*Leith*, Q.C., referred to Dayabhaga, c. iv. s. 2, v. 27 and s. 1, v. 18.] Smriti Chandrika, c. ix. s. 1; Madhavya, par. 50. *Mussumat Thakoor Deyhee* v. *Rai*

(1) 14 Moore's Ind. Ap. Ca. 112.
(2) Ibid. 570.
(3) 9 Moore's Ind. Ap. Ca. 539, at p. 610.

Baluk Ram (1); *Thakoorain Sahiba* v. *Mohun Lall* (2); *Moulvie Mahomed Shumsool* v. *Shewukram* (3); *Rama Lakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (4); *Bhujangrav bin Davalatrav* v. *Malojirav bin Davalatrav* (5). By a family custom proved in this case, *Seetla Bux*, as the son of the first married wife of *Shunkur Bux's* father, takes precedence of *Shunkur Bux*, notwithstanding that the latter is the elder.

Leith, Q.C., and *Doyne* (*C. Arathoon* with them), for the Respondent, contended that the effect of the confiscation of the taluka was to extinguish the rights of the heirs in reversion of *Mypal Singh;* and that of the grant of the sunnud, and of Act I. of 1869, was to confer an estate absolutely on *Kablas Koer*, with descent, in case of her dying intestate and without having adopted or alienated, to her own heirs, as defined in the first ten clauses of sect. 22 of Act I. of 1869, and not to those of *Mypal Singh*, and in default of her having any such heirs then to the Respondent *Janki Koer*, as her heiress according to the ordinary Hindu Law. Of all the parties to these appeals *Janki Koer* is the nearest heir both to *Mypal Singh* and to *Kablas Koer*. The condition in the sunnud as to male heirs is not such a condition as is meant in sect. 3 of the Act, and is not imported into sect. 22, c. 11. That clause, and indeed the whole section, is in substitution for the general direction as to descent contained in the sunnud. With regard to *Brij Indar Bahadur*, he is not of *Kablas Koer's* blood, or heir to her in any way. If he as the son of a daughter of *Kablas'* co-wife is to be considered in law as son of *Kablas'* own daughter, the Respondent's title is nevertheless preferential to his. In no case is he or either of the other Appellants, nearest male heir according to the rule of primogeniture of *Kablas Koer*, within the terms of the sunnud, or according to Act I. of 1869. The alleged custom set up by *Shunkur Bux* and *Seetla Bux* to exclude females, is not proved.

With regard to the argument that there was here an implied

(1) 11 Moore's Ind. Ap. Ca. 139, 172, 174.
(2) 11 Moore's Ind. Ap. C. 386.
(3) 11 Bomb. L. R. 249–274.
(4) 14 Moore's Ind. Ap. Ca. 591.
(5) 5 Bomb. H. C. R. A. C. J. 161.

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trust in favour of the husband's heirs, there are cases when an express trust created by the sunnud has been recognised, but no case has gone so far as to recognise an implied trust. To do so in this case would be virtually to repeal the confiscation and remit *Kablas Koer* to her former title. There was no intention expressed or to be implied from the correspondence at the time of granting the sunnud to benefit the heirs of the husband. The full power of alienation given to her was inconsistent with an intention to favour the old line.

Cowie, Q.C., *Joshua Williams*, Q.C., and *Mayne*, replied for the three Appellants respectively.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

These three appeals were argued together. In each of them the Appellant was Plaintiff in a separate suit instituted by him against the Respondent in the Court of the Deputy Commissioner of *Pertabghur* to recover possession of taluka *Pawansi*, in pergunnah *Dingwas*, in the province of *Oudh*. In each case the Plaintiff claimed to have become entitled to the taluka by right of inheritance upon the death of *Thakurain Kablas Koer*, the mother of the Defendant.

The property in dispute was formerly part of the estate of *Rai Chein Singh*, the great-grandfather of *Mypal Singh*. *Mypal Singh* held it under the Native Government down to the time of his death in 1260 Fuslee, corresponding with the year 1852–53.

Upon his death he left two widows; the first married was *Mussamat Subhao Koer*, and the second the above-mentioned *Thakurain Kablas Koer*. By his first wife, *Subhao Koer*, he had two daughters, of whom the elder, *Jaganath Koer*, was the mother of the Appellant, *Brij Indar Bahadur Singh*. The other died without issue. By his second wife, *Thakurain Kablas Koer*, he had one daughter, *Ranee Janki Koer*, who married *Rai Bajai Bahadur Singh*, and is the Defendant in the suits, and the Respondent in each of the three appeals.

At the time of the annexation of *Oudh* the estate was in the possession of the aforesaid *Kablas Koer*, to whom it had descended as the surviving widow of her deceased husband, *Mypal Singh*.

In 1858 the estate was confiiscated by the British Government by virtue of Lord *Canning's* Proclamation of the 15th of March in that year.

The summary settlement for 1858–59 was made with *Kablas Koer*. In the kabulyat dated the 20th of April, 1858, executed on her behalf on that occasion, she was described as the widow of *Lal Mypal Singh*, and it appears from an administration paper put in evidence in *Brij Indar's* case that *Kablas Koer* admitted that in virtue of the ancestral right of her husband the regular settlement had been made with her.

A sunnud was afterwards granted to her by Government, by which the full proprietary right, title, and possession of the estate was conferred upon her and her heirs for ever, subject to certain conditions, which are not material with reference to the present case. It was also declared to be another condition of the grant that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir, according, to the rule of primogeniture, but that she and all her successors should have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption, to whomsoever she should please. It was also further declared that as long as the obligations imposed by the grant should be observed by her and her heirs in good faith, so long would the British Government maintain her and her heirs as proprietor of the estate.

It is extraordinary that this sunnud is without date, at least it so appears in the copy put in evidence in each of the three suits; but it must have been subsequent to the date of the letter from Major *MacAndrew*, the Deputy Commissioner, of the 4th of February, 1861, for he there states that if *Kablas* would file a deed of will in the terms of the proposal therein contained, she would receive a sunnud for the estate from Government. It must also have been after the date of her petition in answer, dated the 15th of March, 1861, in which she asks to have a sunnud for life granted to her. It is exceedingly inconvenient, but it often

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happens in records sent up from the Courts in *Oudh*, that documents are without dates. Their Lordships mention this that the attention of the Judicial Commissioner may be drawn to the subject.

The letter from Colonel *MacAndrew*, to which reference has just been made, and the petition of *Kablas* in answer to it, were relied upon in the argument on the part of the Appellants, in order to shew that under the grant to her and her heirs the heirs of her husband must have been intended. They appear, however, to their Lordships strongly to support the view that the grant to *Kablas* and her heirs was not made through inadvertence, and that her heirs were intended.

In the letter Colonel *MacAndrew* says, "Among the thakoors of *Dingwas* there is no one next of kin to the husband of the Thakurain who may be declared as heir, and according to the circular orders she as power, after the receipt of the sunnud, to alienate her estate by will to any one." He gives reasons why she should make a will in favour of *Seetla*, and concludes by saying, "if you file a deed of will in terms of the above proposal, you will receive a sunnud for the estate from the Government." In her petition in answer, after pointing out her objection to execute a will in favour of *Seetla Bux*, she concludes, "I myself am at a look out, and as soon as I get a person of high family, good character, and condescending manners, such as will answer my choice, I will let your Honour know. Meanwhile it will be an act of grace on your part to confer a sunnud on me for life. On no account am I willing to adopt *Seetla Bux* and *Shunkur Bux*. I therefore pray that, on receipt of the report from *Pertabghur* District, my objections herein laid down may be fully taken into consideration."

The Government after this, and after having had time for considering the expediency of granting to *Seetla Bux* the succession to the estate upon the death of *Kablas*, conferred the estate upon her and her heirs male, according to the law of primogeniture, without even mentioning the status of *Kablas* as a widow, either in the operative words or in describing her. If, therefore, the letter and petition could properly be taken into consideration in construing the sunnud, with a view to ascertain the intentions of

Government, they would operate more against than in favour of the claims of *Seetla* and *Shunkur*.

Upon the death of *Kablas*, in August, 1872, the Appellant, *Brij Indar*, claimed to inherit as the son of *Jaganath Koer*, the daughter of *Subhao*, the first wife of *Mypal* and the rival wife of *Kablas*.

Lal Shunkur Bux and *Lal Seetla Bux* each claimed as a distant collateral relative of *Mypal*, the deceased husband of *Kablas*. Each was a son of *Ragnath Singh*, who was a great grandson in the male line of *Rai Chein Singh*, who was the great grandfather of *Mypal Singh*.

Seetla was the son of the first wife of *Ragnath*, and *Shunkur*, who was born before *Seetla*, was the son of the second wife. Each claimed to be male heir according to the law of primogeniture.

The Deputy Commissioner dismissed the suit of *Brij Indar*, and also that of *Shunkur Bux*, and his decrees in those suits were affirmed by the Commissioner. There was, therefore, no appeal to the Judical Commissioner in either of those cases, and in each of them the appeal to Her Majesty in Council is from the judgment of the Commissioner. In the case of *Seetla Bux* the Deputy Commissioner decreed for the Plaintiff. The Commissioner, upon appeal, reversed that decree, and decreed the taluka to the Defendant *Janki Koer*, and upon appeal to the Judicial Commissioner he affirmed the decree of the Commissioner. The appeal of *Seetla Bux* to Her Majesty in Council is, therefore, from the decree of the Judicial Commissioner.

The case is an important one, and was very ably argued on behalf of each of the parties, and their Lordships have very carefully considered all the arguments which were urged, and the authorities which were cited in support of the claims of the several Appellants.

The first question to be considered is whether the estate, in the event of the intestacy of *Kablas*, descended to her heirs or to the heirs of her husband. Upon this point their Lordships entertain no doubt.

They consider that the sunnud conferred, and was intended to confer, a full proprietary and transferable right in the estate upon *Kablas* and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life,

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with full power of alienation, and with remainder to the male heirs of her husband, in the event of her dying intestate without having alienated it in her lifetime.

If the interest which *Kablas*, as the widow of her deceased husband, originally took in the property had remained unaltered, she would have had no power of alienation either in her lifetime or by will. The estate would have descended to the heirs of her husband, and not to her heirs; but her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord *Canning's* Proclamation, by which it was declared that "the whole proprietary right in the soil is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting." In disposing of that right by the sunnud, the Government granted to *Kablas* and her heirs male, according to the law of primogeniture, the full proprietary right and title to the estate.

The title, however, does not depend entirely upon the sunnud, for in 1869, Act No. I. of that year was passed to prevent, as appears from the preamble, doubts as to the nature of the rights of certain talukdars and others in the estates which had been conferred upon them by the British Government, and as to the course of succession thereto.

By sect. 2 the word "talukdar" was defined, and it was declared to mean "any person whose name is entered in the first of the lists mentioned in sect. 8."

The name of *Thakurain Kablas Koer* was entered in the first of such lists. It was also entered in the second of the lists mentioned in sect. 8 as one whose estate, according to the custom of the family on and before the 13th of February, 1856, ordinarily descended to a single heir.

By sect. 10 of the Act, list No. 1 is conclusive evidence that *Kablas* was a talukdar within the meaning of the Act, and there can be no doubt that the estate in dispute is one of the estates referred to by the Act, and that by virtue of sect. 3, *Kablas Koer* must be deemed to have acquired by the sunnud a permanent heritable and transferable right in the estate in dispute.

It was contended by counsel that a trust was created, and that *Kablas* took the estate upon trust for those who would have been

entitled to it if it had not been confiscated. To hold that such a trust arose would reduce to a nullity the confiscation and the disposal by the Government of the property confiscated. The power of alienation by sale, mortgage, gift, or bequest, was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband. Their Lordships are of opinion that no trust was created by the sunnud or by the Act of 1869; and there is no evidence that a trust was created in any other manner.

As regards the succession, their Lordships are of opinion that the limitation in the sunnud was wholly superseded by Act. I. of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of sect. 22 of that Act. By that section it was enacted that if any talukdar whose name should be inserted in the second, third, or fifth of the lists mentioned in sect. 8, or his heir or legatee, should die intestate, such estate should descend in manner therein described.

Their Lordships do not consider that the positive limitations in that section are in any way controlled by the provision in the 3rd section of the Act, to the effect that the right acquired by virtue of the talukdari sunnud should be subject to all the conditions affecting the talukdar contained in the sunnud under which the estate is held. They understand the conditions referred to in clause 4 of that section to be the conditions of loyalty and good service mentioned in the letter of the 19th of October, 1859, republished in the first schedule of the Act, and to the other conditions of a similar nature, such as those of surrendering arms, destroying forts, &c., contained in the sunnud.

It was contended in the Lower Court, on the part of *Brij Indar*, that he being the son of a daughter of a rival wife, and having been treated by *Kablas* in all respects as her own son, came within the meaning of clause 4 of sect. 22; but it was found by both the Lower Courts that there was no proof that he had been so treated, and their Lordships entirely agree in that finding. It is unnecessary, therefore, to express any opinion as to whether he was the son of a daughter of *Kablas Koer*, the talukdar, within the meaning of the clause.

It having been decided that *Brij Indar* did not come under

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clause 4 of sect. 22, neither of the Plaintiffs is within the description contained in clauses 1 to 10, both inclusive.

The case is therefore to be governed by clause 11, which is as follows:—

"Or in default of any such descendant, then to such persons as would have been entitled to succeed to the same under the ordinary law to which persons of the religion and tribe of such talukdar or grantee are subject."

In the absence of any special custom applicable to the particular tribe or family to which *Kablas* belonged (as to which advertence will be made hereafter), the ordinary law applicable to persons of her religion and tribe is the Mitakshara.

Chap. 2, sect. 11, treats of the separate property of a woman, and of the distribution of it. In par. 1 of that section it is said "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property."

It was stated in the course of the argument by the learned counsel for *Shunkur Bux*, that in the original of par. 1, ch. 2, s. 11, of the Mitakshara, and of par. 12, c. 4, s. 1, of the Dayabhaga, the words translated as "separate acquisition," are not used, and that the proper translation is "and the like," or "and such like." It does not appear to their Lordships to be important whether this is so or not. The learned counsel may be correct. But the words "and the like" or "in such like" would shew that the author did not intend to limit his definition to the particular kinds of property therein enumerated. This is very clear when the subsequent paragraphs are referred to.

At par. 4, ch. 2, s. 11, of the Mitakshara, it is said "The enumeration of six sorts of woman's property by *Menu*, 'What was given before the nuptial fire, what was presented in the bridal procession, what has been bestowed in token of affection or respect, and what has been received by her from her brother, her mother, or her father, are denominated the sixfold property of a woman' (*Menu* 9, 194), is intended, not as a restriction of a greater number, but as a denial of a less."

The Dayabhaga is to the same effect. Par. 18, ch. 4, s. 1, is as follows:—

"Since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number six as specified by *Menu* and others is not definitely meant. But the text of the sages merely intend an explanation of woman's separate property. *That alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control.*"

Again, in the Mitakshara, par. 2, ch. 2, s. 11, it is laid down that property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by *Menu* and the rest "woman's property."

Again, par. 3, "The term 'woman's property' conforms in its import with its etymology, and is not technical; for if the literal sense be admissible, a technical acceptation is improper."

There is a note to par. 2, above quoted, with reference to property obtained by inheritance, and their Lordships' attention was called to it by the learned counsel for *Shunkur Bux;* but as the estate in dispute did not come to *Kablas* by inheritance, it is unnecessary to determine whether immoveable property acquired by a woman by inheritance is "woman's property." It has been decided that a woman cannot, even according to the Mitakshara, alienate immoveable property inherited from her husband, and that upon her death it descends to the heirs of her husband, and not to her heirs: *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (1).

The question does not arise in this case whether if the grant had been made to *Kablas* in her husband's lifetime the property would have been her peculiar property, over which her husband would have had no dominion or control: see Dayabhaga, c. 4, s. 1, pars. 20 and 23; for the property was granted to *Kablas* after her husband's death. The taluka must, in their Lordships' opinion, be considered to have been the property of *Kablas* at the time of her death.

A woman's property having been described in the first eight paragraphs of the section, the distribution of it is then propounded—"her kinsmen take it if she die without issue;" but it

(1) 11 Moore's Ind. Ap. Ca. 175.

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is only in the event of her dying without issue that her kinsmen succeed.

Par. 9 goes on: "If a woman die 'without issue'—that is leaving no progeny—in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be forthwith described."

Par. 10. "The kinsmen have been declared generally to be competent to succeed to a woman's property." The author now distinguishes different heirs, according to the diversity of the marriage ceremonies. The property of a *childless* woman married in the form denominated *Brahma*, or in any of the four unblamed modes of marriage, goes to her husband; but if she leave progeny it will go to her daughter's daughters. In other forms of marriage, as the *Asura*, &c., it goes to her father and mother on failure of her own issue."

The words "daughter's daughter" are made clear by par. 15: "On failure of all daughters, the grand-daughters in the female line take the succession, under the text, 'if she leave progeny it goes to her daughter's daughter.'" And, again, by par. 12, "In all forms of marriage, if the woman leaves progeny, that is, if she have issue, her property devolves on her daughters." In this place, by daughters, grand-daughters are signified; for the immediate female descendants are expressly mentioned in a preceding passage: "The daughters share the residue of their mother's property after payment of her debts."

Par. 13. "Hence, if the mother be dead, daughters take her property in the first instance."

Par. 16 deals with the case of a multitude of grand-daughters, and is not applicable to the present case.

A custom of the tribe was set up and relied upon to the effect that the property of a Bissein could be inherited only by a Bissein, and that it descended to collateral male heirs in preference to a daughter.

The Commissioner in his judgment said that the custom among Chattris that collaterals are preferred to daughters is no doubt true, but it cannot be said to be specially proved in the case of Bissein Chattris. The Judicial Commissioner, however, was of

opinion that the Plaintiff had failed to prove the special usage and custom which he had set up, and that there was no sufficient evidence to warrant the Courts excluding daughters from the succession.

Their Lordships concur in that view, and are of opinion that there was no sufficient evidence to prove the custom set up. Beyond all doubt there was no such custom proved as regards the separate or absolute property of a woman. Their Lordships are, therefore, of opinion that, under clause 11, sect. 22, the estate descended to the Defendant (Respondent) as the person entitled under the ordinary law to which persons of her mother's religion and tribe were subject; and being of that opinion, it is not necessary to consider whether, if *Kablas* had died without issue, either of the Plaintiffs would have been entitled to succeed to the estate.

The Judicial Commissioner held that the persons entitled to succeed must be sought amongst the heirs of the husband, and not of the widow.

In this view of the case their Lordships, for the reasons above stated, cannot concur. The decree of the Judicial Commissioner was nothwithstanding correct; for he, holding that the Defendant was heir to her father, *Mypal*, dismissed the appeal against the decree in her favour.

Their Lordships hold that that appeal was properly dismissed upon the ground that the taluka descended to her as heir to her mother, who at the time of her death was the talukdar, and had a permanent heritable right in the estate.

Their Lordships will therefore humbly recommend Her Majesty to affirm the decrees of the Commissioner in the respective cases of *Brij Indar* and of *Shunkur Bux*, and to affirm the decree of the Judicial Commissioner in the case of *Seetla Bux*.

The Appellants in each of the appeals must pay the Respondent's costs in that appeal.

Solicitors for the Appellant *Brij Indar Bahadur Singh*: *Watkins & Lattey.*

Solicitors for the Appellant *Lal Shunkur Bux*: *Rogers & Judge.*

Solicitor for the Appellant *Lal Seetla Bux*: *Horace Earle.*

Solicitor for the Respondent: *T. L. Wilson.*

J. C.* NORENDER NARAIN SINGH. . . . . PLAINTIFF;

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AND

Nov. 21, 22. DWARKA LAL MUNDUR AND OTHERS. . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Mortgage—Notification—Reg. XVII. of 1806, *s.* 8—*Foreclosure—Redemption—Proof of Notification.*

In a suit by the heirs of the mortgagees of certain property, for possession and for registration of names, against the mortgagors thereof and certain purchasers of the equity of redemption in part thereof, it appeared that proceedings had been taken to obtain foreclosure under Reg. XVII. of 1806; that no sufficient proof of notification, under sect. 8 of the Reg., to the mortgagors of the Plaintiff's petition of foreclosure had been given in the suit; that the zillah Judge in the foreclosure proceedings had found due service of the foreclosure petition on a mere statement to that effect by the nazir; that six out of nineteen mortgagors had admitted due service of the petition:—

Held (1), that the finding of the zillah Judge in the foreclosure proceedings, so far from being conclusive, was not even *primâ facie* evidence in the suit of service, sufficient to shift the *onus* of proof in regard thereto.

(2.) The duties of the zillah Judge in foreclosure proceedings are of a ministerial nature, and service of the petition therein must be strictly proved in a suit to enforce them.

(3.) The year allowed for redemption runs from the date of notification, and not from the date of the Judge's order on the petition.

Mohesh Chunder Sein v. *Mussamut Tarinee* (1) approved.

(4.) The mortgage being for one entire sum, of one entire share of property, giving one entire right against all the mortgagors, notification to the above-mentioned six mortgagors would be insufficient to warrant the foreclosure of the whole property or any of it.

(5.) The purchasers of the equity of redemption, whether they have taken possession or not, having purchased prior to the foreclosure proceedings, must be duly served.

APPEAL from a decree of the High Court (April 13, 1874) which reversed that of the Subordinate Judge of *Bhaugulpore* and dismissed the suit of the Appellant. The suit out of which this

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 10 Suth. W. R. F. B. 27.

appeal arose was instituted on the 1st of October, 1872, to get possession of certain lands to which the Appellant alleged that he was entitled under an order of foreclosure. The plaint is sufficiently set out in the judgment printed below. It was brought against *Luchmee Narain Dass* and five others, not parties to this appeal, and also against the Respondents (*Mundurs*) who derived their title as purchasers from the *Dass* Defendants. The Respondents' defences were, first, that the byebilwaffa (conditional sale or mortgage) under which the Appellant claimed and in respect of which he had instituted foreclosure proceedings was not a genuine document; second, that they had had no notice of the foreclosure proceedings; third, that all the mortgagors, either by themselves or their legal representatives, had not been served with notice under sect. 8, Reg. XVII. of 1806; fourth, that some portion of the property sought to be recovered was not comprised within the byebilwaffa aforesaid, and that other portions thereof had been purchased before the date of the byebilwaffa, and for parties other than the Appellant's mortgagors.

The Subordinate Judge found that the byebilwaffa was a genuine document, and that the foreclosure had been properly completed, and in consequence decreed in favour of the Appellant. The High Court, on the other hand, held, on the appeal of the *Mundur* purchasers, that there was "no proof of service of the notification upon the original vendors or their representatives," and that "if any one of the mortgagors or his representatives was not duly served with notice, then the Plaintiff must fail to establish his title by foreclosure."

And the High Court proceeded:—

"In this state of the case it is hardly perhaps necessary for us to mention that one of the original mortgagors, who was called as a witness, expressly stated that notice of the foreclosure was not served upon him. It thus seems to be quite clear that the Plaintiff has failed to make the very first step which he was obliged to take in order to prove his title to the property and the right to recover as against the appealing Defendants.

"But we further observe that even if he had proved that the foreclosure had been duly effected, he would still have to prove that the share of this joint property which the appealing Defen-

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dants admitted that they had got from some of the mortgagors was in fact a share or a portion of a share of the joint property which was the subject of the original mortgage. But there is no attempt, as far as we can see, made by the Plaintiff to prove this. It must be remembered that the property mortgaged was but 5 annas, 3 gundas odd share out of the 16 annas; and the whole of the remaining shareholders have not been brought before the Court, or rather I should say that none of them have been. There is in truth a total failure of proof that the Plaintiff is entitled to recover the share of the joint property which is in the hands of either of the two appealing Defendants. It therefore follows that the Plaintiff's suit ought to have been dismissed. We are of opinion that the decree of the Subordinate Judge is wrong, and must be reversed, and as against the appealing Defendants the suit must be dismissed with costs in both the Courts."

Leith, Q.C., and *Doyne*, for the Appellant, contended that the evidence established that due notice had been given to the mortgagors or their agents of the petition of foreclosure, and that they appeared upon such notice. The return of the nazir no doubt shews that personal service of notice had not in all cases been effected, but there had been substituted service thereof by affixing it to the houses of the mortgagors, and that, it was submitted, was sufficient. Personal service was not absolutely necessary: see *Musst Koonjoy Sutbhama* v. *Sheopursun Singh* (1). Further, the zillah Judge had in the foreclosure proceedings found as a fact that the notices had been regularly served, and that at all events would be *primâ facie* evidence thereof in this suit. [SIR ROBERT P. COLLIER:—Were the duties of the zillah Judge in those proceedings judicial or merely ministerial?—SIR MONTAGUE E. SMITH referred to *Meer Abbas Aly* v. *Nund Coomar Ghose* (2). *Arathoon* referred to *Forbes* v. *Ameeroonissa Begum* (3).] The Respondents were purchasers who had not taken possession, and they were not entitled to be served; and even if there had been failure to serve the notice upon some of the mortgagors that would not affect the Appellant's right as against those mortgagors who

(1) S. D. A. vol. (1854) p. 281. (2) 7 Suth. W. R. 123.
(3) 10 Moore's Ind. Ap. Ca. 350.

had been served, and also as against the Respondent purchasers who were not entitled to service.

C. W. Arathoon, for the Respondents, some of the *Mundur* purchasers above-mentioned, after arguing that on the evidence the byebilwaffa ought to be held to be a colourable transaction, and if genuine, was not shewn to comprise the portions of property claimed from the Respondents, contended that the Appellant had failed to prove that due notice under sect. 8 of Reg. XVII. of 1806 had been given and duly served on the mortgagors or their legal representatives. Such service must be personal service, and the nazir's report was not sufficient evidence either of the facts stated therein or of due service, assuming the facts to be proved: see *Syud Eusuf Ali Khan* v. *Mussumat Azumtoonissa* (1); *Madho Singh* v. *Mahtab Singh* (2). Notice to the purchasers was necessary, for it has been held that if an assignment by the mortgagor takes place prior to the service of notice the mortgagee must serve notice on the assignee, and a notice of foreclosure does not bind any person who has not been served with it: *Sheo Golam Singh* v. *Ramroop Singh* (3); *Bhanoomutty Chowdrain* v. *Premchand Neogy* (4); *Mohun Lall Sookool* v. *Goluck Chunder Dutt* (5).

The importance of service of notice is to fix the mortgagors with knowledge that the year of grace, within which redemption can be effected, has begun to run out; and that year begins from service of the notice and not from the date of the issue thereof: see *Mohesh Chunder Sein* v. *Mussamut Tarinee* (6).

The petition of foreclosure ought to have been preceded by a demand for payment. According to the express terms of sect. 8, it was a condition precedent to the right to institute foreclosure proceedings, see *Forbes* v. *Ameeroonissa Begum* (7).

Lastly, assuming the byebilwaffa satisfactorily proved, the Appellant admittedly purchased a portion of the mouzah comprised within it, and could not, therefore, throw the whole burden of the mortgage debt on the remaining portion thereof, by claiming in the foreclosure proceedings the full amount of the loan.

(1) Suth. W. R. (1864) 49.
(2) 3 N. W. P. (H. C. R.) 325.
(3) 23 Suth. W. R. 25.
(4) 23 Suth. W. R. 96.
(5) 10 Moore's Ind. Ap. Ca. 1.
(6) 10 Suth. W. R. F. B. 27.
(7) 10 Moore's Ind. Ap. Ca. 350.

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Doyne replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal in a suit brought by the heirs of Rajah *Tek Narain Singh* against certain parties, who may be described as the family of *Dass*, forming one set of Defendants, and persons called *Mundur*, who formed another set, the latter being purchasers of the property in question from the *Dasses*. The suit was brought for possession and for registration of names, (as stated in the plaint,) "with respect to 3 annas 7 gundas 3 cowries 1 krant out of 5 annas 3 gundas 1 cowrie 1 krant, of mouzah *Dooram Mudehpoora* 'usli' with 'dakhili' pergunnah *Nesingpore Koora*, the property referred to in the deed of conditional sale, after deducting 1 anna 15 gundas 2 cowries, the right and interest of *Sri Narain Dass*, *Bachee Lal Dass*, Rajah *Ram Dass*, *Muhtab Dass*, alias *Laljee Dass*, and *Chunchal Kishore Dass*, purchased by your petitioner's ancestor, and the right and interest of *Shanker Batti* purchased at auction on the 10th of January, 1868, subsequent to acquiring the deed of conditional purchase, at an execution sale by your Petitioner." The conclusion of the plaint is: "Since the principal and interest of the mortgage was neither deposited nor paid by the vendors pursuant to the terms of the mortgage bond, the foreclosure in accordance with the Reg. XVII. of 1806, was formally effected in the Judge's Court at *Bhaugulpore*, by a proceeding dated the 23rd of June, 1867, and the period of one year fixed by the above law expired on the 27th February, 1868, and within that period the amount entered in the bond and interest were not paid, and the conditional sale aforesaid became absolute on the 27th of February, 1868, corresponding with the 19th Falgoon 1275 F.S., and the cause of action for possession and mesne profit arose from the same date."

The action, therefore, is brought after proceedings for foreclosure had been taken upon the deed of conditional sale referred to in the plaint, and to give effect to those proceedings. This deed is dated the 30th of November, 1858; it is from numerous members of the family of *Dass*, in all 19; the deed states that they had "sold and transferred all and every the 5 annas 3 gundas 1 cowrie

1 krant of the entire 16 annas original with dependencies in mouzah *Dorum Mudehpoora*," in lieu of Rs.5000, which had been advanced by Rajah *Tek Narain Singh*. The further statement is, " We have received the consideration money in full in one lump sum in cash from the said vendee, and brought the same into our possession and enjoyment. We execute this deed of conditional sale for two years in lieu of the said consideration, and delivering it to the vendee hereby declare and give in writing that the said vendee shall enter into possession and occupancy of the property sold by right of purchase as proprietor. We promise that in the space of two years from the date of this deed of sale we shall pay the consideration money in question in cash in one lump sum to the vendee aforesaid, and take this deed of sale back. In case we do not repay the consideration in question the vendee shall, after the expiration of the time, be at liberty to foreclose and complete the sale under the provisions of Reg. XVII. of 1806, A.D., and enter into possession and occupancy of the property sold, and to have his own name registered in the Government Records in the column of proprietor."

It seems that the Rajah did not take possession, and no interest appears to have been paid or demanded until proceedings were taken after the Rajah's death by the present Plaintiffs to foreclose the property, under the 8th section of Reg. XVII. of 1806.

The first question which arises (being the question upon which the High Court have decided the case in favour of the Defendants) is whether the directions in that section have been fulfilled. The High Court held that there was no sufficient proof of notification made to the Defendants of the petition of the Plaintiffs claiming foreclosure, and, that being the question, it will be right to look at the terms of the 8th clause. The enactment is, " Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this regulation, may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized vakeels of the Court

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to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a perwannah, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

The condition of foreclosure required by that section is that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may within a year from the time of such notice redeem the property; and in an action of this kind, which is brought to recover possession as upon a foreclosure, it is essential for the Plaintiff to satisfy the Court that this condition has been complied with.

It has been contended on the part of the Appellant that it is within the province of the Judge of the zillah Court to determine whether the notice has been duly served or not, and, although it has not been urged, or only very faintly urged, that his finding would be conclusive on the point, it has been strongly insisted that a finding of the Judge, recorded by him in the proceedings upon the foreclosure petition, would, at the least, be *primâ facie* evidence of the fact of service.

The general nature of the proceedings under the above Regulation was succinctly stated in a judgment of this Committee, in which it was pointed out that the functions of the Judge under sect. 8 are purely ministerial: *Forbes* v. *Ameeroonissa Begum* (1).

Their Lordships, considering that the duties of the zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex parte*, and even if the Judge examined the nazir or person

(1) 10 Moore's Ind. Ap. Ca. 350.

who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as to be *primâ facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.

In the present instance, however, the case shews that the Judge had no proof, properly so called, of the service. It is plain from the manner in which the entry of the service is made, that nothing more occurred than this, that the nazir having received the perwannah, made a return, as it is called, on the back of it stating what he had done with it. The substance of the return is stated in the proceedings of the Judge. After recording that "notices and copies of the petition for foreclosure of mortgage addressed to the opposite party, dated the 27th of February, 1866, A.D., were delivered to the nazir under a perwannah to serve on the opposite party," it goes on, thereupon the nazir submitted a return on the back of the perwannah to the effect that he could not meet the opposite party, and that he stuck up a copy of the notice and of the petition to the houses of each of the opposite party, along with two receipts in the Hindu character severally dated 13th and 14th Cheyt 1273 F.S., written by *Bunsi Chowki Dar* and *Bochal Chamar* '*Poneas*,' inhabitants of mouzah *Khoksisyam*, pergunnah *Nesingpore Koora*, which were annexed on the record." Then it goes on, "To-day the record of the case was brought up, and on a reference to the return submitted by the nazir it appeared that the notice had been duly served." Therefore we have on the face of this document what the Judge considered to be proof of the notice, namely, the return of the nazir, which is a mere statement of that officer, without apparently any verification upon oath, or any examination of the nazir by the Judge.

Upon the trial no proof whatever was given by the Plaintiffs of the service of the notification. They appear to have relied on the recorded return of the nazir. But it was contended that the want of proof is immaterial, in consequence of certain admissions contained in two petitions filed on the part of the mortgagors, the *Dasses*. One is a petition signed by five, and the other by six.

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They were originally nineteen in number, and the remainder do not appear to have petitioned or to have made any admission. The first petition refers in this way, and in this way only, to the service: "The applicants caused a notice under Reg. XVII. of 1806 to be issued on the 27th February, 1866, clandestinely served without the knowledge and information of your Petitioners. Now your Petitioners having come to the knowledge of the case from some out-of-the-way sources, offer objections on the following grounds." This petition appears to have been presented a short time only before the end of the year of grace, and contains no admission of the time, or sufficiency of the service. Their Lordships, therefore, consider that it does not amount to an admission that the notice had been properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure.

The other petition no doubt does contain an admission. There is this statement in it: "The petitioners have under a deed of conditional sale, dated the 9th Aughan, 1266, F.S., for Rs.5000, had notice under Regulation XVII. of 1806, in respect of 5 annas 3 gundas 1 cowrie 1 krant of mouzah *Dorum Mundehpoora*, pergunnah *Nesingpore Koora*, zillah *Bhagulpore*, issued to us. Therefore we beg to submit our objections." It is true they do not in terms admit the time at which they had notice, but with regard to those petitioners a Judge would not be wrong in holding that there was an admission by them of due service. But this petition is the petition of six only out of the nineteen mortgagors.

The importance of requiring proof of the service of the notice and not trusting to a bare statement that notice had been duly served is enhanced by the consideration that it has been held by a decision of the Full Bench of the High Court of *Bengal* that the year during which the mortgagor may redeem his property runs, not from the date of the perwannah or the issuing of it by the Judge, but from the time of service: *Mohesh Chunder Sein* v. *Mussamut Tarinee* (1). This decision overruled some cases in the late Sudder Courts, in which it had been held that the year was to run from the date of the notification. Their Lordships are quite

(1) 10 Suth. W. R. F. B. 27.

prepared to adopt the decision of the High Court. It is obvious that if the year is to run from the date of the perwannah, the negligence of the nazir, or other circumstances, may prevent its service for a considerable time after its date, and so the mortgagor would lose the benefit of the full time which it was intended by the Regulation to give him.

The necessity of proving service of the notice has recently been decided by two Courts in *India*, one a Division Court of the High Court of *Bengal*, and another a Division Court of the North-Western Provinces. In both it has been held that the service should be proved in the action which is brought to enforce the foreclosure: *Syud Eusuf Ali Khan* v. *Mussumat Azumtoonissa* (1). The case in the North-Western Provinces is in the third High Court Reports of that Province, p. 325.

What their Lordships have held with regard to the service of the notice would be sufficient to dispose of the case against the Appellants, but for the fact, to which allusion has already been made, of the admission by some of the Defendants that they had received the notice. This opens the question whether the foreclosure is complete as against all or any of the mortgagors. The High Court has held that the omission to serve any one of the mortgagors would be fatal to the validity of the foreclosure. Their Lordships think that in the circumstances of this case service upon those only of the mortgagors, whose petition admitted service, would be insufficient to warrant the foreclosure of the whole property or of any of it.

This is a mortgage for one entire sum, and the property, although held in certain shares, was mortgaged as a whole to the extent of five annas and a fraction, and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate, and each and every one of them had a right by payment of the money to redeem the estate, seeking his contribution from the others. The equity of redemption of those who were not summoned, and who had no notice that the mortgagee was demanding his money, cannot be foreclosed because those who have been served have omitted to redeem. It is im-

(1) Suth. W. R. (1864) 49.

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possible for the mortgagee to obtain a foreclosure of the whole of the estate upon a service on some only of the mortgagors. Then with respect to the mortgagors who have admitted notice, it is to be observed that it was not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate, as upon one mortgage, one debt, and one entire right against all.

Further, the *Mundurs*, the Defendants of the second class, purchased some share of some of the *Dasses* before the foreclosure proceedings took place. It appears that in February, 1861, two or three years after the conditional sale, and before the notice of foreclosure, two gundas and two cowries was sold to the *Mundurs*. It is said that they did not take possession, but they had become by this purchase the owners of the equity of redemption of the purchased shares, and notice of foreclosure ought to have been served upon them. Mr. *Doyne* has argued that a purchaser who has not taken possession need not be served. Their Lordships, however, think that that argument cannot be sustained. The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate.

A question of this sort came before this tribunal in the case of *Mohun Lall Sookool* v. *Goluck Chunder Dutt* (1). Their Lordships say upon it, "It is quite clear upon the authorities, that if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser, and in the circumstances above stated their Lordships conceive that it ought to have been served upon the decree holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heiress of the original mortgagor."

There are subsequent cases in *India* which shew that the view taken by their Lordships has been followed in practice.

Without saying that there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some of such shares only, their Lordships think the proceedings in this case are not such as will sustain the present action as against any of the Defendants.

What their Lordships have said is enough to dispose of this case, but they think it right to advert to the main question which

(1) 10 Moore's Ind. Ap. Ca. 14.

arose upon the merits, whether this conditional sale was intended between the parties to be really operative as a *bonâ fide* instrument.

It seems that Rajah *Tek Narain* was a patron of a family of the *Dasses*. They were involved in debt, and he probably advanced money to them from time to time. But with regard to this particular instrument there is strong evidence, arising from the history of the case and from facts which are beyond dispute, for presuming that it was not intended to be acted upon by Rajah *Tek Narain*. The deed is dated the 30th of November, 1858. In its terms it provides for immediate possession. A question, indeed, was raised whether that was so. It was said that the construction was at the least doubtful, and that it was not intended that the Rajah should have possession until the two years mentioned in the deed for the payment of the money had elapsed. However this may be, possession was not taken. No provision is made in the deed for payment of interest, and none was demanded. The two years given by the deed for the payment of the money expired no the 30th of November, 1860. The petition to foreclose was not filed until the 2nd of January, 1866, and up to this date it is plain that the Rajah had not entered into possession, had received no interest, nor apparently had asked for any. He obtained what is called the order of foreclosure on the 14th of September, 1867. The note of the Judge that the foreclosure was "sanctioned" cannot indeed be properly regarded in the light of an order. He takes certain proceedings, and makes a record of them, but he can give no judgment in any way binding on the parties. However, the proceedings in his Court were complete on the 24th of September, 1867. Again no action is taken; possession is left where it was, no interest apparently is demanded, and this suit is not brought until the 1st of October, 1872, nearly fourteen years after the mortgage, and five years after the foreclosure proceedings came to an end.

Then the property is dealt with by the Rajah himself in a manner which seems quite inconsistent with his having a deed of conditional sale which was intended to be acted upon. In 1861 a lease was granted by the *Dasses* to the Rajah (in the name of his servant *Bijoz Dass*) of six annas and certain fractions of annas of the same mouzah. Those annas must have included the whole of the shares which had been mortgaged—it appears to have included

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more; it is an ordinary lease, and part of the rent was to be deducted on account of a former zurpeshgi. Again in 1867, after the Rajah's death, his sons obtained decrees against the *Dasses*, and the right and interest of the *Dasses* in this estate were notified for sale under those decrees. It appears that just before the days when the sale was to take place the *Dasses* sold their shares to the *Mundurs*, who alone appear here as Respondents, obtained a large sum of money from them, and paid over that money in discharge of the judgment debt. Those circumstances are not referred to to shew that the conditional sale did not exist, but they are inconsistent with its existence as a document which was intended to be acted upon. Throughout the above transaction there is no trace that it was referred to, or that any notice was given of it, or that anybody knew anything of it. Again, the Rajah, after the conditional sale, as admitted in the plaint, purchased some of the shares of the *Dasses* which had been mortgaged. They are sales as if the *Dasses* had the absolute ownership. The deeds in no way refer to the mortgage, nor was any provision made respecting the mortgage debt.

It is not necessary for their Lordships to go further into these transactions. They have adverted to them because they were desirous of expressing the opinion they entertain of the extreme doubt, to say the least, which rests upon the *bona fides* of the conditional sale. They do not desire to impute fraud to either the Rajah or the *Dasses*. The Rajah had probably taken this deed from them to act upon it in case he should think it right, but did not think it right to do so; and having kept it for so long a time without acting upon it, there is strong evidence in this and in the other circumstances of the case which have been adverted to, leading to the conclusion that it is not a *bonâ fide* conveyance as against *bonâ fide* purchasers, which the Defendants, the *Mundurs*, are.

On the whole case, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this appeal with costs.

Agent for the Appellant: *T. L. Wilson.*

Agents for the *Mundur* Respondents: *Barrow & Barton.*

HURROPERSAUD ROY CHOWDHRY AND ANOTHER . . . . . } PLAINTIFFS;

AND

SHAMAPERSAUD ROY CHOWDHRY AND OTHERS . . . . . } DEFENDANTS.

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1878
Jan. 15, 16, 19.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Interest on Mesne Profits—Act XXXII. of 1839, *sect.* 1.

Interest on mesne profits may be awarded as of course from date of suit in a decree.

Although such interest may be given from a date prior to the suit, their Lordships, under the circumstances of this case, including an unexplained delay in prosecuting the appeal, directed that the interest should run only from date of suit.

APPEAL from a decree of the High Court (Aug. 15, 1863), whereby a decree of the Principal Sudder Ameen of the 24 Pergunnahs (Feb. 18, 1861) was modified.

The suit was to recover mesne profits of certain land which were claimed as amounting to Rs.207,893. The Principal Sudder Ameen gave judgment for Rs.28,682, but the High Court, in the decree appealed from, refused to allow mesne profits for so long a period as had been allowed by the Court below, and reduced the amount allowed to Rs.21,302.

The facts of the case sufficiently appear in the judgment of their Lordships.

The main question decided was as to the Plaintiff's right to interest on the mesne profits awarded to him and as to the date from which such interest would run.

Doyne, for the Appellant, contended that having regard to Act XXXII. of 1839 the interest sought was payable, and ran from the date of written demand or the date of filing the plaint. [SIR JAMES W. COLVILE:—The Act applies to debts or sums

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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certain; that is not your case.] The Defendant has received a liquidated sum which he is decreed to pay over to us. If the Act does not apply, then we are thrown back on the Civil Procedure Code: see Act VIII. of 1859, sect. 193, and XXIII. of 1861, sect. 10. See also Circular Order, March 4, 1836; *Carrau's* Index to Decisions of Sudder Court, tit. "Interest," No. 53. [SIR JAMES W. COLVILE:—That refers to interest ordered by the Court.] See also Circular Order, April 7, 1837; there is no distinction between wasilat and a debt on a contract in regard to the claim for interest: see *Carrau's* Reports of Summary Cases in Sudder Court, Oct. 1, 1850, p. 195 [Ed. 1853], *Rungmala* petitioner. See also *Bamun Doss Mookerjee* v. *Mussumat Tarinee* (1), where interest on wasilat was allowed from each year in which it accrued.

Both Courts were in error in allowing it only from the date of the Principal Sudder Ameen's decree. It was either payable from the respective dates when each item of mesne profits became payable, or from date of demand in writing, or from the date of filing the plaint.

Leith, Q.C. (*Souttar* with him), for the Respondent, referred to *Arman Singh* v. *Permesuree Suhaee* (2); *Muneeram Acharjee* v. *Sreemutty Turrungo* (3).

Doyne replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The transaction out of which this suit arose occurred nearly half a century ago, and from it has flowed a continuous stream of litigation, not in all respects creditable to the earlier tribunals of *India*, down to the present day. A history of that litigation, given shortly and clearly, will be found in a report in the 8th volume of *Moore's* Indian Appeals, of a judgment of this Committee, which was delivered on the occasion to be hereafter mentioned. Their Lordships deem it enough to refer to that case without recapitu-

(1) S. D. A. 30 Sept. 1850, p. 533; 7 Moore's Ind. Ap. Ca. 169, 199.

(2) 4 Select Rep. 176.

(3) 7 Suth. W. R. 173 (20 Feb.)

lating the history, inasmuch as the facts necessary to the determination of the points now before them need no very lengthened statement.

Two brothers, *Doorgapersaud Chowdhry* and *Tarapersaud Chowdhry*, of whom *Doorga* was the elder, entered into an agreement of compromise for the purpose of settling disputes then pending between them on the 4th of April, 1829. That agreement of compromise may be sufficiently described for the present purpose as one whereby in substance the elder brother took ten sixteenths of the ancestral property, and the younger brother six sixteenths. *Tara*, the younger brother, disputed this compromise upon various grounds; but it was affirmed by the Court, which was then called the Provincial Court, on the 2nd of September, 1829. *Tara* appealed from that decision to the Court of Sudder Dewanny Adawlut, and the Court of Sudder Dewanny Adawlut affirmed the decision of the Provincial Court and directed possession to be given to *Tara* of his portion of the property. *Tara* accepted this decision and endeavoured to obtain his rights under it, and his first step for that purpose was to apply to Mr. *Ross*, one of the Judges of the Court of Sudder Dewanny Adawlut, who, in concurrence with Mr. *Walpole*, each sitting alone, had given the judgment affirming the decree of the Provincial Court, to order wasilat to be given him. The decree had only decreed possession. The application was made under a circular order, which empowered the Court in such cases to award wasilat to be recovered by proceedings in execution; and it claimed wasilat from the date of the decision of the Provincial Court. Mr. *Ross* so far complied with this request as to order wasilat, not from the date when it was claimed, but from the 4th of July, 1832, the date at which the decision of the Sudder Dewanny Adawlut Court had been given.

The history of the litigation during the next twenty years may be thus summarised. *Tara* pursued every legal means in his power to obtain his rights under that decree; that is to say, to obtain possession of the property and wasilat or the mesne profits for the period during which possession of it had been withheld. The elder brother *Doorga* endeavoured to defeat his claims by a variety of excuses and pretences, all of which have been found to be false. *Tara* succeeded in obtaining from time to time possession of certain

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portions of the property, but he never appears to have succeeded in obtaining any wasilat. It may be enough, however, to pass on to the year 1853, when *Tara* obtained an order from Mr. *Money* for a sum of Rs.40,000 wasilat, and a considerable amount of interest. *Doorga* appealed against that order on the ground, which he appears to have raised then for the first time, that Mr. *Ross*, who made the original order in respect of the wasilat in 1832, had acted without jurisdiction, inasmuch as he could not make the order without the concurrence of his colleague Mr. *Walpole*, and the Court of Sudder Dewanny Adawlut gave effect to this objection. So that the Court of Sudder Dewanny Adawlut in effect ruled that all the litigation which had gone on for twenty years was absolutely fruitless.

Under those circumstances, *Tara* instituted the present suit in December, 1853. *Tara* and *Doorga* have long since died, and this appeal is now prosecuted and defended on behalf of their representatives.

The suit came on to be heard before the Principal Sudder Ameen of the day, and he decided that the *Statute of Limitations* was a bar to the claim of *Tara* to wasilat for more than twelve years before the commencement of the suit. But for those twelve years he gave him wasilat, calculated upon the footing of certain hustabood papers which were put in by the Plaintiff. The Plaintiff contended that he was entitled to avail himself of those hustabood papers on this ground: he said "the hustabood is my rent-roll of a certain portion of lands which have been made over to me by my brother. This is some evidence in the absence of contradictory evidence of what the rent was before it was handed over, and therefore of the wasilat or mesne profits to which I am entitled." These hustabood papers had been received in the abortive proceedings which have been referred to, and were received in this case by the Principal Sudder Ameen. There were cross appeals from this judgment, and the case came before the then Sudder Dewanny Adawlut in the year 1857, whereupon that Court reversed the decision of the Principal Sudder Ameen, holding that the *Statute of Limitations* was not a bar to any portion of the claim, and remanded the case to be retried *ab initio*, as they expressed it. This judgment of the Sudder Dewanny Adawlut was

on appeal affirmed by this Board in the judgment before referred to; their Lordships holding that the *Statute of Limitations* did not apply to *Tara's* demand, because he had instituted *bonâ fide* though ineffectual proceedings, for the purpose of obtaining his rights,—not, as they expressed it, under the agreement alone but under the judgment enforcing it.

The case was then tried on the remand by another Principal Sudder Ameen. He found that the Plaintiff was entitled to wasilat from the date of the first judical decision, in September, 1829, of the Provincial Court. On the question of the amount of wasilat he rejected the hustabood papers, and valued the land at 1 rupee per beegah. With reference to the question of interest, he decreed interest to the Plaintiff from the date of the decree, holding that the claim of wasilat must be considered as then for the first time settled and liquidated.

From that decree there was an appeal to the High Court, which varied the decision of the Principal Sudder Ameen as to the time from which the right of the Plaintiff to wasilat commenced, decreeing that it commenced not from the decision of the Provincial Court, in 1829, but from the decision of the Sudder Dewanny Adawlut Court in 1832; they affirmed the decree in other respects. From that judgment of the High Court the present appeal is preferred.

The questions now before their Lordships are—first, from what time the right to wasilat commenced; secondly, what should be the amount of wasilat; and, thirdly, what the amount of interest, if any, upon the wasilat. Upon the first question it is desirable to look to the terms of the two judgments that have been referred to. The first judgment affirming the compromise is to be found recited (it is nowhere found separately) in the judgment of the Court of Sudder Dewanny Adawlut in these terms: "It is ordered that the deed of compromise and release be admitted, that the case be struck off the file of this Court, and that the parties conform to these stipulations. The Court on becoming acquainted with it shall enforce the observance of the same on the refusing party."

Now one of the stipulations was that *Doorga*, the elder brother, who was in possession of the property, should relinquish to his

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younger brother six sixteenths. It therefore appears to their Lordships that the direction to conform to these stipulations is a direction, though possibly an informal one, that *Tara* should be put in possession of that property. This decision was confirmed in these terms by the Court of Sudder Dewanny Adawlut: "Therefore, in concurrence with the aforesaid gentleman"—that is the Judge of the previous Court—"Ordered that the appeal preferred by the Appellant be dismissed, and that the decision passed in the Provincial Court of Appeal, dated the 2nd of September, 1829, be affirmed; that should the Appellant, agreeably to the deeds of compromise, not have received possession of his share, he be put in possession of the same on the execution of the decree." It appears to their Lordships that this decree of the Sudder Dewanny Adawlut must not be taken as establishing for the first time any new right of either of these parties, but as simply affirming, with an explanation, for it is nothing more, the former decree. The rights of the parties, therefore depend upon the former decree, and it is the former decree which is effective, and which had to be executed. It appears to their Lordships, therefore, that *Doorga* after the first decree, receiving as he did all the rents and profits of the property, received the rent of six-sixteenths of it for the use of his brother, and that he is bound to account to his brother for those rents and profits. They, therefore, agree with the view taken by the Principal Sudder Ameen upon this question, and disagree with that taken by the High Court.

The second question is as to the amount of wasilat. It has been contended that the Principal Sudder Ameen was bound to accept those hustabood papers as fixing the rate of wasilat, which undoubtedly was a good deal higher than the rate which he allowed. He was bound to do so, it is said, because they had been accepted by the previous Sudder Ameen, and by the Courts in former proceedings. But their Lordships do not concur in this view. It may be well here to read the terms in which the judgment of the Court remanding the case is couched. "As this judgment reopens the question of wasilat from the date of the deeds of adjustment, the whole evidence on that matter will require reconsideration. We therefore remand the case, that the

whole question of wasilat may be taken up and considered *ab initio.*"

If the Court had expressed themselves satisfied with the award of wasilat within the last twelve years, and only directed an inquiry as to the additional wasilat accruing before that time, they might have so expressed themselves, but their Lordships think it probable that they expressed themselves as they have because there was a cross appeal, in which the validity of these hustabood papers would have been disputed, abstaining from giving judgment upon that question, and remitting the whole matter to the Principal Sudder Ameen. The Principal Sudder Ameen expressed himself as dissatisfied with those hustabood papers, which appear to have been put in, but of which, as far as it appears, there does not seem to have been any proof given to him, although some proof seems to have been given of them on former occasions. He describes them as concocted at home by the Plaintiff, and questions their genuineness chiefly on the ground that they give an annual value to the property greater than that which it bore at the time of his judgment; the value of land having notoriously very much increased since the wasilat claimed had accrued. He also observes that he directed, for the benefit of the Plaintiff, an inquiry before an Ameen as to the value, which the Plaintiff declined. Under these circumstances he forms, undoubtedly, a somewhat rough estimate of the annual value of the property as one rupee per beegah. It may be that, under the circumstances, the Principal Sudder-Ameen might have been justified in accepting and acting upon these hustabood papers, but it is quite another question whether their Lordships are to say that he was bound to act upon them. It appears to their Lordships that this is a decision upon questions of fact, namely, the genuineness of these hustabood papers, and the actual value of the land, and that decision having been affirmed by the High Court they see no sufficient reason to take this case out of the ordinary rule, whereby they affirm a decision on a question of fact, come to by two Courts.

The remaining question is that of interest. And here it may be as well to refer to the terms of the statute, Act XXXII. of 1839, very much in accordance with the statute of 3 & 4 Will. 4, c. 42, s. 28, in this country, which has given rise to a great number of deci-

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sions, all of which are not easily reconcilable. The words of the section are: "It is therefore hereby enacted that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." If the statute had stopped here it might be that the Principal Sudder Ameen and the Court were right in saying that there was no actual ascertained or liquidated demand until the wasilat was determined by the decree. But these words follow: "Provided that interest shall be payable in all cases in which it is now payable by law." And that refers their Lordships to the state of the law and the practice in *India* independently of the statute. They have taken some pains to ascertain what that law and practice has been, and have been referred to a number of cases upon the subject. It may be enough now to quote a case, which is to be found reported in *Carrau's* cases in the Presidency Sudder Court of the date of 1850, where certain resolutions were come to at a sitting of all the Judges of the Court, and among those resolutions was this: "Interest on mesne profits may be awarded as of course from date of suit in a decree; when, however, interest is awarded from an earlier or from a later date than of suit special reasons should be assigned in the decree." Their Lordships find that this resolution has been, to a great degree, acted upon in subsequent cases, indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided. But having regard to the circumstances of this case, and among them may be stated the very great delay, which has not been thoroughly explained, in the prosecution of this appeal, their Lordships think it enough that the Plaintiff should have a decree for interest upon the mesne profits decreed to be calculated from the commence-

ment of the suits up to the date of the decree. The decree will carry interest on the whole amount decreed from its date, at the usual rate of 12 per cent.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Principal Sudder Ameen be affirmed as to the amount decreed to the Plaintiff for mesne profits, and reversed as to the residue, and that it be ordered that the Defendant pay to the Plaintiff interest on the amount decreed for mesne profits at the rate of 6 per cent. per annum, to be calculated from the date of the commencement of the suit to the date of the decree of the 18th of February, 1861, and that the costs in the first Court be ascertained and be paid by the parties respectively in proportion to the amount to be decreed and disallowed by the decree so to be amended, and that the Defendant do pay interest at the rate of 12 per cent. per annum upon the total amount to be decreed by the decree so to be amended as aforesaid, from the date of the decree of the 18th of February, 1861, to the date of realization; that the costs of the appeal in the High Court be assessed and ordered to be paid by the parties to that appeal respectively in proportion to the amounts to be decreed and disallowed by the decree to be amended as aforesaid. And it will be ordered that the Respondents do pay the costs of this appeal.

Agents for the Appellants: *Barrow & Barton.*
Agents for the Respondents: *Young, Jackson, & Beard.*

J. C.* 1878 Jan. 17, 18; Feb. 5.

SRIMATI UMA DEYI . . . . . PLAINTIFF;

AND

GOKOOLANUND DAS MAHAPATRA . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Law of Benares—Succession of Indigent Daughter through a Childless Widow—Adoption of distant Kinsman—Dvyámushyáyna.

According to Hindu law as it obtains in *Benares*, failing a maiden daughter, the succession to a deceased father's estate devolves on an indigent married daughter, and her right of succession is not lost by reason of her becoming a childless widow.

The adoption of a very distant relation, not included within the sapindas of the adoptive father, made in violation of the preferential right of the son of a brother of the whole blood, was held to be valid. The texts which prescribe the preferential adoption of such son have not the force of laws.

Quære, whether an only son of a brother can be adopted as dvyámushyáyna.

APPEAL from a decree of the High Court (March 8, 1875), reversing a decree of the subordinate Judge of *Cuttack* (Sept. 15, 1873), and dismissing the Appellant's suit. For a report of the case in the High Court see 15 Beng. L. R. 406.

The questions in the suit, as to which the Indian Courts arrived at different conclusions, were as to the adoption in fact and law of the Defendant *Gokoolanund Dass* by *Hullodhur Dass Mahapatra*, deceased, and, in default of such adoption, as to the right of the Appellant to succeed in whole or in part to the estate of her father, the said *Hullodhur Dass*, according to the law of the Mitakshara school.

The Appellant was a childless widow, and admittedly, so far as regards the Defendant, in indigent circumstances. Her sister *Parbutti* had a husband and children living, but was provided for by her marriage. At the time of the Respondent's adoption *Hullodhur Dass* had a nephew, named *Dinobundhoo*, the son of his whole brother *Juggobundhoo*, whom, according to the contention of

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

the Appellant and the opinion of the First Court *Hullodhur Dass* was in law bound preferentially to adopt, if he were minded to adopt any one at that time.

On the death of *Hullodhur*, a contest as to the right to obtain a certificate to administer his estate under Act XXVII. of 1860 arose between the Respondent, the grandson of *Hullodhur's* brother, one *Hurihur Pershad*, and the present Defendant *Parbutti*.

The Appellant was not a party to that litigation.

The Judge, on the 27th of June, 1871, granted the certificate to the Respondent *Gokoolanund*, on the ground that in his opinion there was sufficient evidence of his having been adopted to entitle him to it.

The suit out of which this appeal arose was instituted on the 22nd of June, 1872, by this Appellant.

The Defendant *Parbutti* put in a written statement, by which she claimed her father's estate, on the ground that she was in indigent circumstances, while the Plaintiff was not so, and that *Gokoolanund* had not been adopted.

The Defendant *Gokoolanund*, by his written statement, maintained his adoption, and set up in proof of his having been recognised by *Hullodhur Dass* as an adopted son, the purchase by *Hullodhur* in his, the Defendant's, name of various parcels of land, in the conveyance of which he, the Defendant, was described as a son of *Hullodhur Dass*.

With regard to the issue whether such adoption, if proved in fact, was good and valid under Hindu law, the subordinate Judge held as follows:—

"Had the adoption even been proved, I should have decided this issue against the Defendant *Gokoolanund*, for it is admitted that *Hullodhur* had at the time a nephew, named *Dinobundhoo*, living, and during his lifetime the adoption of another was invalid according to the Dattaka Mimamsa, which applies to the province of *Orissa* as being governed by the *Benares* School of Hindu Law. Against this decision, however, it is urged, first, that the adoption of a nephew is not compulsory, and, next, that *Dinobundhoo*, as an only son, could not have been adopted. But I do not consider either of these objections to be good, for *Sutherland*, the highest English authority on the subject, I find, has laid down the law

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differently, and supports altogether the view I take of the matter, *vide Kishen Kishore Ghose's* edition of *Sutherland's* Synopsis of the Hindu Law of Adoption, p. 180."

The High Court (*Macpherson*, C.J., and *Pontifex*, J.) overruled this decision as follows:—

"Assuming the fact of the adoption there is some difficulty as to its validity, *Dinobundhoo*, the son of a brother, having been alive at the time, as there is something in the nature of authority to support the objection. But we have no evidence as to this *Dinobundhoo;* what his age was at the time of *Gokoolanund's* adoption; whether he was married or unmarried, &c. Nor do we know whether his father would have permitted his adoption by *Hullodhur*. This, however, we do know, that *Dinobundhoo's* father never considered that *Dinobundhoo's* being in existence rendered the adoption of *Gokoolanund* invalid; for *Dinobundhoo's* father himself treated *Gokoolanund* as the adopted son of *Hullodhur;* moreover, it is clear that the parties to this suit, none of them, when this litigation commenced, considered the adoption assailable on this ground, for they set up another adoption, that of one *Radhakishen*, since deceased, whom they allege *Hullodhur* adopted about thirty years ago. If *Dinobundhoo's* existence invalidated the adoption of *Gokoolanund*, it would have equally invalidated that of *Radhakishen*. But so far as the parties themselves are concerned, *Dinobundhoo's* existence was never dreamt of as forming any obstacle.

"No doubt, it is said by Mr. *Sutherland* (see his Synopsis, p. 665, *Stokes'* edition), that the only son of a whole brother, if no other nephew exists for adoption, must be adopted by his uncle requiring male issue, and is dvyámushyána, or son of two fathers. It is said that no man having a brother's son alive, who can be taken as dvyámushyána, can adopt any other person.

"According to the rules laid down in the Hindu law books it is wrong to adopt an only son; but an exception is made in the case of an only son being adopted by his father's brother, when he becomes dvyámushyàna, the son of both the brothers. And a special adoption of this kind is said to be proper, and one which ought to be made. But we do not think that the mere fact of the existence

of a brother's son deprives the uncle of the right to adopt anyone save that son, if the son's father refuse to give him in adoption. And even if the brother was willing, we incline to the opinion that the provisions of the Hindu law really go no further than to sanction the adoption of an only son (such an adoption being ordinarily bad), if the adoption is made by his father's brother, when he can become dvyámushyána. In all cases of adoption, and especially in a case such as this, where the adoption has been deemed good, and apparently acquiesced in for many years by all the parties, we think that the rule which ought to be applied is that which is in fact usually followed, and is well indicated by Sir *Thomas Strange* in his work on Hindu law, vol. i. p. 85, where he says: 'The result of all the authorities is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription rendering invalid an adoption of one not being precisely him, who on spiritual consideration ought to have been preferred.' Whatever may be the strict rule laid down by the texts of the old Hindu writers, and even supposing it to be what Mr. *Sutherland* states it is, there is no doubt that in practice Hindus are not in the habit of restricting their adoption in the manner now contended for."

Leith, Q.C., and *Doyne*, for the Appellant, after arguing that the adoption of *Gokoolanund* was not established by the evidence, contended that, even if proved, it would have been illegal and invalid by reason of the preferential right of *Dinobundhoo* to be adopted. They referred to Dattaka Mimamsa, sect. II., pars. 28, 29, 30, 31, 67–74; Dattaka Chandrika, sect. I., pars. 20, 21, 22, 27, and 28; *Sutherland's* Synopsis, par. 4 (*Stokes'* Hindu Law, p. 665); *Macnaghten's* Hindu Law, pp. 21, 22; and the Mitakshara, c. II., sect. 2, c. 1, s. 3, par. 11. Reference was also made to *Ooman Dutt* v. *Kunhia Singh* (1).

THEIR LORDSHIPS intimated that they did not require to hear the Respondent as to the fact of the adoption or the due performance of ceremonies, but merely on the point whether the adoption was invalid by reason that the brother's son had been passed over.

(1) 3 S. D. A. (Select. Rep.) p. 144.

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C. W. Arathoon, for the Respondent, contended that the mere fact of the existence of a brother's only son does not, according to the Hindu Law, deprive the uncle of the right to adopt any other save that son: see Dattaka Mimamsa, sect. 2, pars. 28, 29, &c. [SIR ROBERT P. COLLIER:—Does the author say that no one shall be adopted if a brother's son exists?] The text does not say so, but *Sutherland's* Synopsis does: second heading, *Stokes'* Hindu Law, p. 665. [SIR ROBERT P. COLLIER:—What evidence is there that "it is generally admitted," does he support himself by texts?] He only refers to the texts of the Dattaka Mimamsa, but see *Strange's* Hindu Law, vol. i. p. 84, vol. ii. [ed. 1830], p. 98; *Colebrooke* and *Ellis*, Ibid. p. 102, referring to the Mitakshara, c. 1, sect. xi. [SIR MONTAGUE E. SMITH:—*Sutherland* seems to think it established by the text that in case there is a brother's son, it is imperative to adopt him, but not imperative to adopt the nearest relation where the relationship is more remote.] Even *Sutherland* admits that it is not a rigid maxim of law, but see *Strange's* Hindu Law, vol. ii., p. 113, and *Strange's* Manual of Hindu Law [2nd ed. (1863)], clause 94, p. 24; *Macnaghten's* Principles of Hindu Law, pp. 68, 69; *Cowell's* Lectures on Hindu Law, 1870, p. 327.

Further, the Appellant has no right to sue. Though an indigent daughter, she is also a childless widow, and therefore disqualified from inheriting, and without any *locus standi* to question this adoption: see Mitakshara, c. II., sec. 2 *et seq.*; Smriti Chandrika, ch. xi., sec. 21, pars. 21, 28; *Strange's* Manual, p. 80, pars. 328, 329. For a case arising under the *Bengal* school see *Aumirtolall Bose* v. *Rajoneekant Mitter* (1).

Leith, Q.C., replied:—

With regard to the objection taken to the Appellant's *locus standi* as Plaintiff, the only two classes of daughters mentioned in the Mitakshara are the married and unmarried, the former being divided into indigent and wealthy. There is no exclusion of a childless widowed daughter by Mitakshara law, which differs in that respect from the school of *Bengal*. There may be some difference between the schools of *Madras* and *Benares* on this point, but the parties to this suit are governed by the law of

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Benares. *Strange's* references in the citations made on the other side are to *Bengal* authorities.

As to the adoption of other than the brother's son, that must stand or fall by its inherent legality. The doctrine of *factum valet* is not recognised by the school of *Benares.* *Colebrooke* and *Ellis*, in the passages referred to, are wrong in their construction of the Mitakshara. On the original authorities cited this adoption is invalid.

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The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The general question raised by this appeal is who was entitled to succeed to the estate of one *Hullodhur Dass Mahapatra*, an Oorya Brahman, who died in December, 1870. He left by his wife *Jumoona*, who predeceased him some four years before that date, two daughters—*Uma Deyi*, the Plaintiff in the cause, and *Parbutti Deyi.* Both had been married, but *Uma Deyi* was a childless widow, dependent upon and living with her father at the time of his death, whilst *Parbutti* was and is living with her husband, a man of some substance, by whom she had had children, still living. He also left the Defendant, *Gokoolanund Dass*, who claimed to be his son by adoption.

In January, 1871, the last-named person applied to the Judge of *Cuttack* for a certificate under Act XXVII. of 1860. His claim was resisted by *Parbutti*, who disputed the adoption, and also by *Hurrihur Persad Dass*, the great-nephew of the deceased. The Judge held that the latter had no *locus standi* as an objector; and as between *Parbutti* and *Gokoolanund*, decided that the latter had *primâ facie* established his title as the adopted son of the deceased, and granted the certificate to him.

Uma Deyi was no party to this proceeding, of which the effect was at most to confirm or put *Gokoolanund* in the possession of the property as the heir of *Hullodhur*, until displaced by a decree in a regular suit.

In June, 1872, *Uma Deyi* instituted the present suit against *Gokoolanund* and *Parbutti*, seeking, as between herself and the latter, to be declared the preferential heir of their father, and,

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impugning the adoption of the former, to recover the estate from him. The questions raised in the cause are determinable by the law of the *Benares* school.

That law, in so far as it supports the claim of the Plaintiff to succeed to her father's estate in default of a son, natural or adopted, is thus laid down by Sir *William Macnaghten*, Principles and Precedents of Hindu Law, p. 22. After stating the rule of the *Bengal* school, he says, "But there is a difference in the law as it obtains in *Benares* on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that in default of indigent daughters, the wealthy daughters are competent to inherit; *but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.*" Nothing addressed to their Lordships at the Bar induces them to think that this is an incorrect exposition of the law. Mr. *Arathoon*, indeed, in support of his contention that the Plaintiff had lost whatever right to inherit her father's estate she would otherwise have possessed by reason of her being a childless widow, relied upon some passages in the Smriti Chandrika, ch. xi. sect. 21, paragraphs 21, 28, in which the author of that treatise adopts and affirms the rule of the *Bengal* school in respect of the disqualification of a barren daughter. But on these it is sufficient to observe that, according to Mr. *Colebrooke* and other high authorities, the Smriti Chandrika contains only an authorative exposition of the law as it prevails in the south of *India*, and consequently that the passages in question are of no weight when set against the propositions which Sir *William Macnaghten* has deduced from the text of the Mitakshara, and other authorities recognised by the *Benares* school. That the Plaintiff, as compared with her sister, is an indigent, or, in the words of the Mitakshara, "an unprovided daughter," seems to be clear. Their Lordships, therefore, though in the view which they take of the other issues it is not necessary to affirm her title as against her sister conclusively, will assume that she has shewn a sufficient title to maintain this suit against the Defendant *Gokoolanund*, and to put him to proof of his alleged adoption.

Two distinct issues have been raised touching this adoption:— 1. Whether it was ever made in fact; 2. Whether, if so made, it is good in law. And as to the first issue it is to be remarked that the Plaintiff has not been content to rely on any deficiency in the proof of the Defendant's case. She has set up, and undertaken to prove, a substantive case of her own.

The case of the Defendant is, that he was by birth the second son of *Nath Dass*, a distant kinsman of *Hullodhur Dass*; that at a very tender age he was taken into the house of *Hullodhur* with a view to his being adopted; that when about five years old, and in the year 1837, he was formally given by his natural, and received by his adoptive father, in adoption with the requisite ceremonies; that he was brought up and educated by *Hullodhur* as his adopted son, receiving from him at the proper age the investiture of the Brahminical thread, and being on a subsequent occasion given in marriage by him; that after he reached man's estate he continued to be recognised in the family as the adopted son, and took part in the management of its affairs; and that in the character of adopted son he performed the funeral ceremonies of *Jumoona*, and afterwards of *Hullodhur* himself.

On the other hand, the case of the Plaintiff is that the Defendant is not the son of *Nath Dass*, that he was by birth a Kanouj Brahman, or other native of the North-Western Provinces; that when young he was brought by other pilgrims to *Juggunnath*, and left at first in a sort of hospice attached to the temple which belonged to the elder brother of *Hullodhur*; that he afterwards lived in the house of one *Hira*, who is stated to have been a concubine of *Hullodhur*; that he was never on terms of commensality with *Hullodhur*; that he never was, and being the son of an unknown father, never could have been adopted by *Hullodhur*; that it was only as a gomashta or dewan that he ever took part in the management of *Hullodhur's* affairs; that *Hullodhur*, some years after the alleged adoption, really adopted one *Radakrishna*, a son of one *Bhika Dass*, who subsequently died; and that *Hullodhur's* funeral rites were performed by the Plaintiff and the persons authorized by her to do the acts which a female cannot herself do.

Their Lordships might feel it difficult to pronounce with confidence for themselves which of these conflicting statements,

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supported as each is by the testimony of numerous witnesses, and in a greater or less degree by documentary evidence, is true. And their difficulty would be greatly increased if one of the Indian Courts had broadly affirmed the truth of the Plaintiff's statement, whilst the other Court had pronounced in favour of the Defendant. But that is not the way in which the case comes before them. The subordinate Judge, though he decided against the fact of the adoption, did not affirm that the original *status* and subsequent history of the Defendant were what the Plaintiff's witnesses represented them to have been; he did not find that *Radakrishna* (as to whose adoption the evidence is of the most loose and general character) was ever adopted by *Hullodhur;* he did not find that the Plaintiff, and not the Defendant, performed the funeral rites of *Hullodhur*. It cannot therefore be said that the Judge before whom they were examined has pronounced the Plaintiff's witnesses to be worthy, and the Defendant's witnesses to be unworthy, of credit. On the contrary (giving, perhaps, a little more weight to some supposed admissions by two of the Plaintiff's witnesses than their words warrant), he expressed his belief "that the Defendant *Gokoolanund* had for years lived with, and been brought up, and treated as a son, and married by *Hullodhur*." He held "it also to be clear from the evidence tendered for the defence that the Defendant had frequently been acknowledged by others as the adopted son of *Hullodhur*, and was even so styled by *Hullodhur* himself in a written statement filed by him in an Act IV. of 1841 Case before the Magistrate of *Balasore*." We have, therefore, the Judge of first instance affirming, contrary to the general evidence on the part of the Plaintiff, facts most material to the Defendant's case, and the genuiness of the documentary evidence produced in support of it. His finding against the fact of adoption proceeds upon the improbability that in 1837 *Hullodhur*, who might reasonably hope to beget, would adopt a son; upon the discrepancy between certain of the Defendant's witnesses as to the presence of *Nath Dass* at the ceremony; and upon the insufficiency of proof that all the requisite ceremonies were performed.

In this state of things their Lordships, at the close of the Appellant's case, intimated that they could not see their way to a reversal of the very clear finding in favour of the fact of adoption

to which the High Court upon a review of the whole evidence had come. Their Lordships conceive that the High Court was right in giving credit to the Defendant's witnesses rather than to those of the Plaintiff, who have deposed to a case which appears to be in many respects a false one. Their evidence is strongly corroborated, as the subordinate Judge himself admits, by the documents to which he has given credit; and it seems to their Lordships to prove, as found by the High Court, the performance of the requisite ceremonies with as much certainty as can be expected some thirty years or more after the event.

Against a case so proved, the *primâ facie* improbability of the adoption on which the subordinate Judge so strongly relies cannot, in their Lordships' opinion, weigh very heavily. It must be recollected that it is met not merely by the story of the inference drawn by a pundit from the horoscopes of the husband and wife (a circumstance which, if it really occurred, might have had considerable force upon superstitious minds), but also by the fact that *Hullodhur* and *Jumoona* had lived together as man and wife for a good many years before the final adoption without having issue.

Their Lordships, must, therefore, deal with this case on the assumption that the fact of the Defendant's adoption has been established.

The question whether such an adoption is valid in law is of greater difficulty, and, being one of general application, of far greater moment. It was in order to consider more fully the authorities citied upon this point that their Lordships reserved their judgment.

The objection to the adoption is that it was one of a very distant relation, not even within the class of *Hullodhur's* sapindas, made in violation of the preferential right of *Dinobundhoo*, the only son of *Juggunnath*, who was *Hullodhur's* brother by the whole blood, to be adopted.

The Plaintiff relies mainly upon certain texts of the Dattaka Mimamsa and the Dattaka Chandrika, of which the former is considered by the *Benares* School to be the more authoritative treatise on the subject of adoption.

The texts chiefly insisted upon are the 28th, the 29th, the 30th,

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the 31st, and the 67th slokas or paragraphs of the second section of the Dattaka Mimamsa; and the 20th, the 21st, the 22nd, the 27th, and the 28th paragraphs of the first section of the Dattaka Chandrika.

It is unnecessary to set out these at length, because it may be conceded that they do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a dvyámushyána, or son of two fathers.

The grave question, however, that arises in this case is whether the injunctions just referred to are merely binding upon the consciences of pious Hindus as defining what they ought to do, or are so imperative as to have the force of laws, the violation whereof should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

Before considering this question, their Lordships think it right to observe that the two propositions just stated, or at least the last of them, may well be qualified by the incontestable fact that *Hullodhur* was separate in estate from his brother *Juggunnath*. The whole of the law supposed to affirm the necessity of adopting a brother's son seems to have been deduced by the ancient commentators, with what logical sequence it is unnecessary to consider, from a text of *Menu*, which says:—"If one among brothers of the whole blood be possessed of male issue, *Menu* pronounces that they all are fathers of the same by means of that son." The direct consequence of this might well be that in an undivided family (the normal state of a Hindu family) the nephew, without further act of affiliation, would effectually perform the funeral obsequies of his uncle, whose share in the joint family property, in the absence of male issue, would pass to his coparceners by survivorship. But in the case of a separated Hindu, the right of performing his obsequies, with the consequent right of succession, is in the absence of male issue in his widow, or, failing her, in his daughter and daughter's issue. Again, to constitute a dvyá-

mushyána there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir *William Macnaghten* at p. 71 of his Principles and Precedents. And he there states the consequences to be different from those of an ordinary adoption, inasmuch as the children of the adopted sons would revert to their natural family. Hence the adoptive father fails by such an adoption to perpetuate his own line of male succession,—a circumstance which renders the consent of divided brothers to such an adoption the more improbable. In the present case there is nothing to shew, and it is unreasonable to presume, that *Hullodhur* would have been content to receive, or *Juggunnath* would have been willing to give, the only son of the latter in adoption. And the presence of the name of the latter on some of the documents which describe the Defendant as the adopted son of *Hullodhur*, is some evidence that *Juggunnath* recognised that adoption as valid. Moreover, for aught that appears in the cause, *Denobundhoo* may at the date of the adoption have become from age, marriage, or other like objection, incapable of being adopted by his uncle.

Reverting, however, to the general question whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made, and so destroys the civil *status* of the person thus adopted, even after, as in this instance, years of recognition, their Lordships have to observe, in the first place, that they have been referred to no case in which a Court of Justice has so decided. The nearest authority of the kind is that of *Ooman Dutt* v. *Kunhia Singh* (1). That case arose in a district governed by the Mithila law. The Plaintiff claimed, under an adoption by his maternal grandfather, not in the Dattaka, but in the Kritrima form, which is recognised by the Mithila law, to dispossess the nephew and heir of that grandfather from the share of the latter in a joint family estate. Various objections, besides the one in question, were taken to the adoption; the case, after the fashion of those days, went from one Judge of the Sudder Court to another, who consulted different pundits and came to conflicting decisions, but ultimately the suit was dismissed. The marginal

(1) 3 S. D. A. (Select Rep.) p. 144.

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note, no doubt, says, "According to the Hindu law, while a brother's son exists, the adoption of any other individual as a son, either in the Dattaka or Kritrima form of adoption, is illegal." But the force of this note is very much weakened by the fact that Sir *William Macnaghten*, who, being the editor of the Reports, was probably the author of it, afterwards, and with a full recollection of the case, wrote the passage which will be presently cited. The decision itself was merely on an alleged adoption in the Kritrima form, which, in its inception and consequences, in very distinguishable from one in which the natural father parts with his son in the full faith that he will be effectually and for all purposes received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the Kritrima form retains his rights of inheritance in his original and natural family.

The general question seems to have been considered by Sir *Thomas Strange*, Mr. *Colebrooke*, and other text writers of eminence.

Sir *Thomas Strange*, after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the Plaintiff relies, says: "But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who upon spiritual considerations ought to have been preferred." And by his references to the cases collected in the second volume he shews that Mr. *Colebrooke*, and, more strongly, Mr. *Ellis*, were of this opinion.

Again, Sir *William Macnaghten*, just after referring to the case of *Ooman Dutt*, deals with the question thus: "It would appear, however, that according to the law of *Bengal* and elsewhere where the doctrine of the Dattaka Chandrika is chiefly followed, and where the doctrine of '*factum valet*' exists, a brother's son may be superseded in favour of a stranger; and even in *Benares*, and in the places where the Mimamsa principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the

validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own sapinda (a brother's son is the first), and failing them to adopt out of one's own gotra, is not essential so as to invalidate the adoption in the event of a departure from the rule." (Prin. and Prac. of Hindu Law, p. 68.)

It may be further observed that even Mr. *Sutherland*, in his Synopsis (see *Stokes'* Codes, p. 656), says: "But though *Nandita Pandita* extends this principle (*i.e.*, that proximity of kindred ought to determine the choice of an adopted son) with elaborate minuteness, it cannot be regarded as a rigid maxim of law, vitiating the adoption of a remote when a near kinsman, or of a stranger when a relative, may exist. The right, however, of a whole brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law." It is not easy to see upon what grounds the distinction here taken rests. If what the Dattaka Mimamsa enjoins is to be taken as imperative and having the force of law, the language of the 74th Article of the second section, which deals with the duty of selection where there is no brother's son, seems to be hardly less imperative than that of the articles which affirm the preferential right of the brother's son.

It was urged at the Bar that the maxim "*Quod fieri non debuit factum valet*," though adopted by the *Bengal* school, is not recognised by other schools, and notably by that of *Benares*. That it is not recognised by those schools in the same degree as in *Bengal* is undoubtedly true. But that it receives no application except in *Lower Bengal* is a proposition which is contradicted not only by the passage already cited from Sir *William Macnaghten's* work, but by decided cases. The High Court of *Madras* in *Chinna Gaundan* v. *Kumara Gaundan* (1), and the High Court of *Bombay*, in *Ráje Vyankátrav Anandrav Nimbalkar* v. *Jayavantrav bin M. Ranadive* (2), acted upon it; and did so in reference to the adoption of an only son of his natural father, on which the High Court of *Calcutta* in *Rajah Opendur Lall Roy* v. *Ranee Bromo*

(1) 1 Madras H. C. Rep. p. 54. (2) 4 Bombay H. C. R. A. C. 191.

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Moyee (1) has refused to give effect to it, considering that particular prohibition to be imperative.

Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of *India* in this matter to a rule more stringent than that enunciated by such text writers as Sir *William Macnaghten* and Sir *Thomas Strange*. Their treatises have long been treated as of high authority by the Courts of *India*, and to overrule the propositions in question might disturb many titles.

Upon a careful review of the authorities their Lordships cannot find any which would constrain them to invalidate the adoption of the Defendant, even if it were more clearly proved than it is that *Hullodhur Das* could have adopted *Dinobundhoo*, the only son of his brother. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal with costs.

Agents for the Appellant: *Watkins & Lattey.*
Agent for the Respondent: *T. L. Wilson.*

(1) 10 Suth. W. 347.

SREEMUTTY NITTOKISSOREE DOSSEE . DEFENDANT; J.C.*
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AND
JOGENDRO NAUTH MULLICK . . . . PLAINTIFF. *Feb* 5.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Widow—Amount of Maintenance.

Case in which some of the elements in determining what is a suitable amount of maintenance for a Hindu widow out of her deceased husband's estate were considered.

A Court is not justified in reducing, as a kind of punishment for vexatious defence to a suit, the amount of maintenance which it would otherwise have awarded.

APPEAL from a judgment of a Divisional Bench of the High Court (Sept. 18, 1875), composed of two Judges (*Garth*, C.J., and *Macpherson*, J.), sitting in the exercise of original jurisdiction: see sect. 16 of the Letters Patent of that Court.

The facts of the case fully appear in the judgment of their Lordships.

Leith, Q.C., *Doyne*, and *Woodroffe*, for the Appellant.

Cowie, Q.C., *Graham*, and *Mayne*, for the Respondent.

Upon the question of the amount of maintenance suitable to be decreed under the circumstances, *Comulmoney Dossee* v. *Rammanath Bysack* (1) and Sir *F. Macnaghten's* Considerations of Hindu Law, p. 92, were referred to.

The judgment of their Lordships was delivered by

SIR MONTAGUE SMITH:—

This is an appeal from a judgment of the High Court of *Bengal* sitting in its ordinary original jurisdiction. The action is brought

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Fulton's Rep. 190.

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by *Jogendro Nauth Mullick*, claiming to be the adopted son of *Choytun Churn Mullick;* and the Defendant in the suit (the Appellant) is *Nittokissoree Dossee*, the widow of *Choytun Churn*, and his heir in default of his leaving a natural or adopted son. The principal question in the suit was whether the Plaintiff had been adopted by *Choytun Churn* or not. A great deal of evidence was gone into upon both sides upon the issue so raised. It is unnecessary for their Lordships to advert to that evidence, inasmuch as the learned counsel for the Appellant, upon his opening at their Lordships' Bar, expressed his inability to overturn the judgment on that issue by any argument that he could raise before us upon the evidence. Their Lordships think that in taking that course he exercised a wise discretion, and in no way injured the interests of his client. They have read the judgment of the High Court, and it appears to them that the case was very carefully tried. The judgment contains a lucid and elaborate analysis of the evidence, and assuming that analysis to be accurate, their Lordships can have no doubt that the Court arrived at a sound conclusion in declaring that the adoption had taken place.

Another question arises however in the suit, namely, the maintenance to which the Defendant is entitled as a widow, upon the assumption that the Plaintiff was the adopted son of her husband. Their Lordships would be extremely reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at. It appears to have been the usual course, when there was a Master attached to the Court, for the Court to refer to the Master the question of maintenance, and to consider the proper amount upon hearing the report. In this case the Court did not apparently make any separate inquiry with regard to the maintenance, but acted upon the facts as they appeared in evidence before them, upon the general case. An ordinary form of reference appears to have been this: "Refer it to the Master to settle the amount, regard being had to the value of the estate." Their Lordships think that another element to be considered is

the position and *status* of the deceased husband and of the widow. The main subject of inquiry would be the value of the estate; and the question for the Master, and ultimately for the Court, to consider would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, but that which she might reasonably expend for religious and other duties incident to the station in life which she might occupy.

In this case, independently of the value of the property which has been disputed at their Lordships' bar, there were circumstances which the Court took into consideration, and which their Lordships think may properly be taken into consideration, not as conclusive upon the amount which ought to be awarded, but as affording some guide to the proper amount, if not a measure of it. It seems that the husband, *Choytun Churn*, about two years before his death, had given instructions for his will. That will was never executed, but the papers connected with it were given in evidence by the Plaintiff, and were relied upon as affording strong corroboration of his adoption. *Choytun Churn* himself gave instructions for his will to a solicitor of the name of *Sreenauth Chunder*, who happened to be the brother of *Jogendro*, the Plaintiff, and who was a partner in the firm of *Swinhoe, Law, & Co.* It seems that the testator in his first instructions desired that the interest of a lakh of rupees, in Government paper, should be given to his widow, and, in addition thereto, that she should live in the family house, and be maintained out of his general estate, as she had been in his lifetime. It seems that a draft was made in conformity with these instructions, which was copied; and after receiving the copy *Choytun Churn* had another interview with *Sreenauth*, and in that interview he altered the instructions which he had previously given, and instead of bequeathing the interest of one lakh of rupees to his widow for life, he desired that the lakh should be given to her absolutely. An engrossment was made of the will containing that bequest. Upon this question of maintenance the Court say, at the end of their judgment, after they had disposed of the principal issue that arose upon the adoption, "Under these circumstances, if it had been left to the Court to determine the sum

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which should be awarded to the Defendant in the future for her maintenance we should only have given her the most moderate provision which, having regard to her husband's property and position, the law would allow." The circumstances to which the learned Judges allude are those contained in their summary of the case which appears in the previous paragraph of their judgment, and there, after stating the main positions which they find in favour of the Plaintiff and of the adoption, they add, "That the fact of the Plaintiff being *Choytun Churn's* adopted son was perfectly well known to the Defendant and to all the members of the family." The Court therefore seem to have thought that she was not justified in defending the claim of the Plaintiff as she had done, and that opinion does appear to have influenced their judgment in awarding the maintenance which they thought sufficient to be allowed to her. They say, "We should only have given her the most moderate provision under those circumstances." One cannot read that passage without perceiving that the Court reduced as low as they could, upon the principle upon which they proceeded, the maintenance which they allowed, as a kind of punishment to her for having defended a suit which they thought she must have known was properly brought against her. That the Court, being under this influence, should have allowed its judgment to be affected by it, their Lordships think was a departure from the strict principles which ought alone to have guided it. That influence operating on the minds of the Judges, they proceed to consider what they would allow; and in coming to that conclusion they bear in mind the bequest of the lac of rupees intended to be made to her absolutely, and they refer to an offer which had been made by the Plaintiff. This is what they say:—"But the Plaintiff himself has relieved us of what might otherwise have been an unpleasant duty. He has intimated to us through his counsel that he desires the Defendant to have the same provision as she would have had if her husband's will had been duly executed." This they state to have been the desire of the Plaintiff. "And although, having regard to the Plaintiff being an infant, we do not consider it right to hand over to the Defendant absolutely a lakh of rupees out of the Plaintiff's property, we think

we may without impropriety award her as maintenance the annual sum of Rs.4000 payable monthly." If the objection was to handing over the *corpus* of a lakh of rupees, that might have been obviated by turning the value of the lakh of rupees into an annuity for the life of the widow, which would have produced a much larger sum than the interest merely at 4 per cent. upon the capital. Their Lordships do not say that the Judges were bound to do this; but on the principle on which they would apparently have acted but for the influence on their minds arising from the conduct of the Defendant in the suit, it seems not improbable that that is a conclusion at which they might have arrived. However, what they did was to award a sum of Rs.4000. Their Lordships wish to guard themselves against its being supposed that they consider the Plaintiff bound by his offer, or that the widow is entitled to the lakh of rupees because it was intended to be given to her by the will. They think both those circumstances can be regarded only as elements which may properly be considered in determining a suitable amount of maintenance; and inasmuch as the Plaintiff at one time, through his guardian as it must have been, was willing to settle the matter amicably and to give the widow, and—as the Judges expressed it—desired that she should have the lakh of rupees, their Lordships entertain hope that when the matter is brought before him—if it should be brought before him in *India*—now he is is of full age, he may be disposed to renew that offer, and if not to give the *corpus* of the lakh of rupees, to give an annuity which such a sum would produce. Their Lordships feel that they can do no more than send the case back with that intimation of their hope, and with this further intimation to the counsel here that, judging, as they do, from what they have seen in the Record and what they have heard from the learned counsel, they think that it would not be unfair to either of the parties if they could agree upon raising this sum of Rs.4000 a year to Rs.6000. Their Lordships feel that they cannot impose this arrangement upon the parties, but they throw it out as well worthy of their consideration to prevent any further litigation. If that sum is agreed to, then their Lordships would amend the decree here, by consent, by increasing the sum to Rs.6000. If that is not assented to, their

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Lordships will have no other course but humbly to advise Her Majesty to remit the suit to the High Court of *Bengal* to determine, with reference to the considerations that they have thrown out, the proper amount of maintenance to be allowed to the widow.

On the 12th of February it was intimated to their Lordships by counsel on both sides that the parties in *India* adopted the suggestion made by their Lordships in the foregoing judgment, and their Lordships therefore agreed humbly to report to Her Majesty that, the parties having consented thereto, the decree of the High Court of Judicature ought to be varied by raising the allowance to the widow for maintenance from Rs.4000 to Rs.6000 a year, and further that in other respects the decree ought to be affirmed, each party paying their own costs of this appeal.

Solicitors for the Appellant: *Rogers & Judge.*
Solicitors for the Respondent: *Wrentmore & Swinhoe.*

PERIASAMI AND ANOTHER . . . . . DEFENDANTS; J. C.*
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AND
PERIASAMI AND OTHERS, SONS OF SALUGAI TEVAR . . . . . PLAINTIFFS. *Feb.* 8, 9, 12.

RAMASAMI CHETTI AND OTHERS . . . DEFENDANTS;
AND
PERIASAMI AND OTHERS, SONS OF SALUGAI TEVAR . . . . . PLAINTIFFS.

KOSALARAMA PILLAI AND ANOTHER . . DEFENDANTS;
AND
PERIASAMI AND OTHERS, SONS OF SALUGAI TEVAR . . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Impartible Zemindary—Succession of Widow thereto as to separate Estate—Transfer—Partition.

An ancient and impartible zemindary, originally portion of the *Shivagunga* estate, having descended, under Mitakshara law, as joint ancestral estate to the eldest of three Hindu joint brothers, was in 1829 by a deed of family arrangement transferred by him to the two younger brothers (one of whom died subsequently without issue), to be held by them with all its incidents of impartibility and peculiar course of descent:—

Held, that as between the descendants of the grantor and the son of the surviving grantee, the zemindary was the separate property of the latter; and that on his death his right passed to his widow, notwithstanding the undivided *status* of the family, according to the rule of succession affirmed in the *Shivagunga Case* (1).

THESE consolidated appeals were preferred from three decrees of the High Court at *Madras*, passed in three analogous suits, all dated the 10th of November, 1875. Those decrees affirmed generally the decrees of the first Court, being that of the subordinate

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 9 Moore's Ind. App. Ca. 539.

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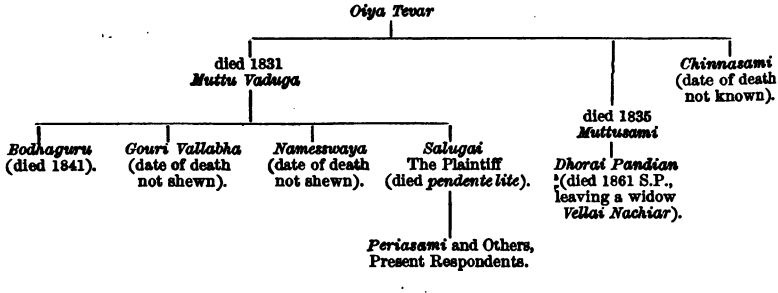
Judge of *Madura*, in the Presidency of *Madras*, dated the 26th of June, 1875, by which the above-named *Salugai Tevar* (Plaintiff below) was declared entitled to possession of certain villages sued for by him, together with mesne profits.

The subject-matter of the litigation was eight villages, which formed an estate called *Padamattur*. That estate, the Plaintiff *Salugai Tevar* contended, was a palayapat or polliam, and therefore an impartible and ancient zemindary, to which, in its entirety, the Plaintiff was entitled to succeed on the death of the last palligar, one *Dhorai Pandian*, who died without male issue on the 7th of November, 1861, and to recover from the Defendants the various villages in suit, which they, after the death of *Dhorai Pandian*, claimed to hold as alienees of his interest, or that of his widow after his death.

The effect and validity of those alienations after the death of *Dhorai Pandian* was the principal question in the suit, and this turned on the nature of the estate enjoyed by *Dhorai Pandian*, and his power to charge or alien beyond his own life the whole or part of the lands of *Padamattur*, and the necessities which existed for his so doing. There were also questions as to the Plaintiff's legitimacy, and as to limitation.

The Courts below concurred in holding that the Plaintiff was legitimate; that he was not barred by limitation; and that the alienations in question were not good after the death of *Dhorai Pandian*.

The following pedigree will be found useful:



The above-mentioned *propositus*, *Oiya Tevar*, was the elder brother of *Muttu Vijaya*, hereinafter mentioned as the grantee of the zemindary of *Shivagunga*.

The facts out of which the present suits arose are as follows :—

The zemindary or palayam of *Padamattur* appears to have been in existence in the earlier part of the last century. It originally consisted of ten villages, but was subsequently reduced to eight, seven of which were in dispute in this appeal.

Both Courts found that this palayam, though subordinate to the *Shivagunga* zemindary, and paying quit rent direct to it, was itself on ancient and impartible zemindary, descendible by primogeniture according to the usage of such zemindaries. That finding was not disputed in this appeal.

In the end of the last century the direct line of the *Shivagunga* zemindars became extinct, and the parties next entitled were the two brothers, *Oiya* and *Gouri Vallabha Tevar ; Oiya*, as the elder of the two, was the proper person to be zemindar. The brothers were however expelled from the zemindary by an usurper, who afterwards rose in rebellion against the *East India Company*. When the rebellion was put down *Oiya Tevar* appears at first to have been recognised by the Government as zemindar, but he was sickly and infirm, and the istimrar sunnud was finally issued to his brother, *Gouri Vallabha*. *Oiya* retained his position as zemindar of *Padamattur*.

In 1823 *Oiya Tevar* was dead, and *Gouri Vallabha* brought an action against his three sons to recover *Padamattur*, alleging that it was part of the *Shivagunga* zemindary, and that he had granted it to *Oiya Tevar* for maintenance. The Defendants retaliated by alleging that they were the true heirs to the *Shivagunga* zemindary, as being the sons of the elder brother, *Oiya Tevar ;* the suit was terminated by a razinamah by which the Defendants gave up their claim to *Shivagunga*, and the Plaintiff declared "that the Defendants should enjoy the said villages for ever."

In 1829 *Gouri Vallabha* died, leaving no male issue, but a wife, *Parvata Nachiar*, then pregnant. On his death the *Shivagunga* zemindary was claimed by *Muttu Vaduga*, eldest son of *Oiya Tevar*, and was given over to him by Government when *Parvata* was delivered of a daughter. In anticipation of this event an agreement was passed by *Muttu Vaduga* to his second brother, *Gouri Vallabha* (otherwise and hereinafter called *Muttu Sami*), by which it was provided, that in the event of *Parvata* being delivered of a

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daughter, the palayapat of *Padamattur* should pass to *Muttu Sami*. This agreement was dated the 20th of June, 1829, and was as follows:—

"Agreement passed on the 9th Ani of Virodhi (20th of June, 1829), by me, *Oiya Tevar's* son, *Muttu Vaduganadha Tevar* of *Padamattur*, in favour of my brother, *Gouri Vallabha Tevar*.

"My junior paternal uncle, *Muttu Vijaya Raghunadha Gouri Vallabha Peria Udaya Tevar*, zemindar of *Shivagunga*, having departed this life, leaving no male issue, I have become entitled to the said zemindary: and you, as my next younger brother, are appointed as zemindar of the palayapat of the said *Padamattur*. But as *Parvata Vardhani Nachiar*, one of the pattam (royal) wives of our above-mentioned junior paternal uncle, is pregnant, we shall act as usual in the matter of the said palayapat in the event of her giving birth to a son. But should she be delivered of a daughter, I and my offspring shall have no interest in the said palayapat, but you alone shall be the zemindar and rule and enjoy the same, allowing at the same time, as per former arrangement, to the younger brother *P. Bodhagurusami Tevar*, the village that has been assigned to him (before). As regards any debt contracted by me during the time that I was zemindar of the said palayapat, you shall have no concern at all therewith, but I shall myself be responsible for the same. Thus this agreement has been executed by me, *Muttu Vaduganadha Tevar*, of my own accord, to *Gouri Vallabha Tevar*. This has been written by (signed) *Shanmukha Pillai*, son of *Kandsami Pillai*, residing at *Pidaricheri*.

(Signed) "*Muttu Vaduganadha Tevar*."

This agreement took effect upon the birth of *Parvata's* daughter; and from that day to the commencement of the suits out of which these appeals arose, the *Padamattur* zemindary had gone in the line of *Muttu Sami's* descendants.

Muttu Vaduga died in 1831, leaving four sons, of whom the eldest, *Bodagurusami*, succeeded to the zemindary of *Shivagunga*, so separated as aforesaid from the said *Padamattur* zemindary.

Muttu Sami was succeeded in 1835 by his son *Gouri Vallabha Tevar* (otherwise called "*Dhorai Pandian*"), and the charges and

alienations which were in issue in the suit principally took place in his time.

Dhoria Pandian died on the 7th of November, 1861; and on the 2nd of December, 1873, *Salugai Tevar* filed the three suits out of which these appeals arose. The plaints were identical, except as to the names of the Defendants, and of the villages claimed, and they prayed that the Plaintiff's right might be established to the zemindary of *Padamattur* and villages attached.

On the 26th of June, 1875, the subordinate Judge decreed that the Plaintiff be declared entitled to the villages sued for as against the Defendants, and that they do deliver the same to the Plaintiff with mesne profits and costs.

On the 10th of November, 1875, the High Court affirmed the decree with costs.

Leith, Q.C., and *Mayne* (*Norton* with them), for the Appellants, contended that *Salugai Tevar* was not competent to maintain these suits since he had not made out his alleged title to the *Padamattur* zemindary as heir, "as the only surviving son's son of *Oiya Tevar*." The case was governed by the Mitakshara, and if the estate in question be regarded as the joint ancestral estate of the three sons of *Oiya Tevar*, the heir must be sought for in the elder branch. If on the other hand the effect of the agreement of the 20th of June, 1829, and of the death of the third brother, *Chinna Sami*, was to constitute this estate the sole and separate estate of the second brother, *Muttu Sami*, as if on a partition, then *Dhorai Pandian* took as against the elder branch of the family a separate estate to which his widow, on failure of sons, was entitled to succeed; and consequently the suits were premature. See the *Shivagunga Case* (1). The effect of the agreement must be considered. It was submitted that the grantor conveyed absolutely thereby and did not reserve to himself any reversionary interest; whilst the rights which he and his heirs would have had by survivorship were parted with. If however the grant reverted under the circumstances to the heirs of the grantor, the heir in that case would not be *Salugai Tevar*, for the zemindary being impartible would descend according to the rule of primogeniture.

(1) 9 Moore's Ind. App. Ca. 539.

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Sir *James Stephen*, Q.C., and *Cowie*, Q.C. (*Doyne* with them), for the Respondents, contended that the properties in question were held as joint estate before 1829, that thereafter the family remained joint and undivided, that the effect of the agreement of 1829 was not to create a partition and convert these properties into separate estate, but to transfer the ostensible headship of the family to the second brother and his descendants, thus reducing the elder line to the position of a junior line *quoad* this property. Nevertheless the property remained joint, it was so treated by the family, and the arrangement in the *Shivagunga Case* (1) proceeded upon that footing. The agreement could not therefore preclude the Plaintiff in these suits from claiming by right of survivorship the joint property after the death of *Dhorai Pandian*. The primogeniture rule as regards polliams and their descent is not to be construed according to the strict rule of English law. Here there was no evidence of any special law or custom as regarded collateral succession; and therefore the ordinary Hindu law applied, regard being had to the impartibility of the subject of succession. Reference was made to *Urjun Singh* v. *Ghunsiam Singh* (2); *Buboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (3); *Nara Gunty Lutchmeedavamah* v. *Vengama Naidoo* (4); *The Shivagunga Case* (5). If no rule of primogeniture was applicable to the principal estate, then none was applicable to the subordinate estate.

By the ordinary rule of Hindu law the brother excludes the brother's son, here, the grandfather's grandson has priority over the grandfather's great grandson: Mitakshara, c. II. § 5, and see also *Kishen Kishore's* edition of the Mitakshara, Table of Succession, and *Prosonocoomar Tagore's* Table of Succession.

Leith, Q.C., in reply, insisted that the estate was separate estate, and referred to the case of the *Tipperah Raj; Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (6).

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The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The question common to the three suits which have been con-

(1) 9 Moore's Ind. App. Ca. 539.
(2) 5 Moore's Ind. App. Ca. 169–175.
(3) 12 Moore's Ind. App. Ca. 1–39.
(4) 9 Moore's Ind. App. Ca. 85, 86.
(5) Ibid. 552.
(6) 12 Moore's Ind. App. Ca. 523.

solidated in the appeal before their Lordships is whether the Plaintiff, one *Salugai Tevar*, was entitled to recover from the Defendants in possession, all of whom claimed to be purchasers for value from the late proprietor *Dhorai Pandian* under different titles, seven villages, being in fact all that remained of the ancient palayapat of *Padamattur*, which seems to have consisted originally of ten villages.

The various questions which were raised and determined in the three causes, in all of which there was judgment for the Plaintiff, were substantially the same. Of these some are no longer contested, and of those that are contested, the only one that has been argued before their Lordships is whether *Salugai Tevar* had established a sufficient title to maintain the suits. It is upon this question alone that their Lordships have now to express their opinion.

Before doing so, however, they wish to make some observations upon the manner in which the Courts in *India* dealt with this question, as appears from the following passage in the judgment of the High Court. The learned Judges say, "The Defendants not only denied the legitimacy of the Plaintiff, but also asserted that *Dhorai Pandian*, the last proprietor, having left a widow, *Vellai Nachiar*, who is still alive, the right of suit is with her and not with the Plaintiff. The subordinate Judge, regarding the suit not as raising any question between contending heirs, but as a suit brought to recover from strangers family property unlawfully alienated by a member, held that the Plaintiff might sue, subject to any question between himself and others concerning the right to the inheritance. It appears to us that the right of *Dhorai Pandian's* widow, which was the only right urged in the Court below as prior to the Plaintiff's, cannot be maintained, for the estate of *Dhorai Pandian* was not a separate acquisition by him, following the course of succession prescribed for separate estate, but an ancestral estate of the character already mentioned, the right to which would vest on his death without issue in the next collateral male heir of the undivided family in preference to the widow. In this Court the Defendants have urged a new ground of objection to the Plaintiff's competency to sue, which is said to arise on the Plaintiff's deposition given in the suit. It is urged

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here that 'there are preferential heirs to the estate, who are descendants of an elder branch of the family.' We find that the Plaintiff, in his cross-examination, after mention of *Muttu Ramalinga Shervai*, the son of the istimirar zemindar, whose legitimacy was questioned in the suit of 1823, says that his, the Deponent's, elder brother had two sons (by a kept mistress), and that there are three grandsons of his still living. The inquiry was not, so far as is shewn, fully pursued, nor was the Court asked to decide upon the matter, and the issue already noticed respecting the prior title of *Dhorai Pandian's* widow was alone tried and disposed of. A decision unfavourable to the Defendants having been given, they now seek in appeal to bring forward for the first time an objection to the Plaintiff's right to sue, which they declined to urge in the Court below. We think they cannot fairly be permitted in this stage of the case to defeat the suit by such an objection. If there are other and nearer heirs, their rights will remain unaffected, and any decree to be now given may make reservation of such rights. The Plaintiff for the purposes of the present suit may be regarded as entitled to the succession, and it is unnecessary to consider the arguments which were addressed to us on the subject of the course of descent of this property on the assumption that there was in existence descendants of his elder brother."

Their Lordships are of opinion that there is nothing to take these cases out of the general rule relating to actions in the nature of actions of ejectment, namely, the well-known rule that the Plaintiff must recover by force of his own title. They think that it would be in the highest degree unjust to allow the Defendants, who had been for nearly the whole time of prescription in possession of villages of which they claimed to be purchasers for value, to be turned out of possession by any person other than one who had established a clear title to present possession. To allow this on the ground that if there should turn out to be other persons with a higher title than the Plaintiff those persons might recover over against him, is obviously to deprive the Defendants of their undoubted right to defend their possession by setting up the *jus tertii*, and it is further to be remarked that those persons might possibly have been unable themselves to recover from the Defen-

dants by reason of having by lapse of time or acts of confirmation or acquiescence lost the right to question their title.

With these observations their Lordships will pass to the consideration of the question before them, with reference to which it will be sufficient to confine their observations to the proceedings in the first and principal suit.

The particulars of the claim, as stated in the plaint, are that the palayapat of *Padamattur* was an impartible and ancient zemindary descendible by inheritance, according to the custom governing other similar zemindaries and to the Hindu law; that it was last ruled by a person with many aliases, being the *Dhorai Pandian* mentioned in the pedigree; and that he held the right of ruling it till the 7th of November, 1861, when he died at *Padamattur*, without issue. The title of the Plaintiff to succeed to him is thus stated: "The Plaintiff being the son of the deceased *Muttu Vaduganadha Tevar*, who was the undivided brother of the said *Gouri Vallabha Tevar, alias Muttu Sami*, and of the deceased *Bodhaguru Tevar*, is the only son's son now surviving of *Oiya Tevar*," who was the common ancestor. The plaint therefore asserts a title in the Plaintiff to succeed to the palayapat on the death of *Dhorai Pandian*, and consequently the right to impeach the alienation of the villages made by him. The nature and impartibility of the estate have been found by the High Court confirming the decision of the Lower Court in these words: "We conclude that *Padamattur* is shewn to be (apparently like other similar groups of villages in the *Shivagunga* zemindary) a palayapat impartible, and therefore held by one member of the family and descending on a single heir." The question remains whether, on the death of *Dhorai Pandian* in 1861, the Plaintiff of right became the polygar. The facts stated in the plaint relating to his descent from the common ancestor are consistent with the pedigree set out above, and may be taken as proved. And it may be true that upon those facts he would have been, according to the ordinary course of the Hindu law of succession, the next heir to *Dhorai Pandian* in the collateral line of succession if that person had left no widow, or if the widow were from the nature of her husband's estate incapable of inheriting it. It may, however, be a question whether, putting the widow's possible right

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out of question, he would be entitled to succeed to the palayapat. Nothing has been found by either Court in *India* as to the rule which governed the abnormal descent of *Padamattur* to a single heir. There is some evidence that up to the date of the transactions to be next considered it was governed in the course of direct descent from father to son, by the rule of primogeniture; but as to the rule in the case of collateral succession there is no evidence.

It may be desirable, before their Lordships approach the direct question to be decided, briefly to recapitulate some of the facts relating to this estate. *Oiya Tevar*, the then zemindar of *Padamattur*, died in 1815. He was succeeded by his eldest son, *Muttu Vaduga*. That person had two brothers, and therefore, whether *Oiya Tevar* were previously joint with his brother *Gouri Vallabha*, the istimirar zemindar of *Shivagunga*, in respect of *Padamattur* or not, the latter estate must be taken to have descended to *Muttu Vaduga*, as ancestral estate. He would therefore necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was, up to the year 1829, in a sense the joint property of the joint family of the three brothers. In 1829, however, the uncle of the three brothers, who was zemindar of the great impartible zemindary of *Shivagunga*, died. *Padamattur* appears to have been a sub-tenure of that estate, paying rent to the zemindar, and it was supposed that if *Gouri Vallabha*, the deceased zemindar, left no male issue, that large estate would go, according to the Mitakshara law of succession in the case of joint family property, to his eldest nephew, *Muttu Vaduga*, the then polygar of *Padamattur*. In consequence of this the family arrangement embodied in the document of 1829 set out above took place. The true construction and effect of that document will be afterwards considered. At present it is sufficient to say that the effect of it was to transfer the palayapat of *Padamattur* to the next brother, *Muttu Sami*, on whose death it descended to his only son

Dhorai Pandian, who enjoyed it till his death in 1861. In the meantime the great estate of *Shivagunga* was enjoyed, first by *Muttu Vaduga*, next by his eldest son and second son in succession, and lastly, by his eldest grandson by that second son. During all that time, however, the litigation concerning the title to *Shivagunga*, of which the history will be found in the 9th volume of *Moore's* Indian Appeals, at page 539, was going on. That was finally determined in 1863, by the judgment of this Committee, which ruled that, though the zemindar of *Shivagunga*, who died in 1829, had continued to be generally undivided in estate with the family of his brother *Oiya Tevar*, the former polygar of *Padamattur*, the zemindary of *Shivagunga* was his self-acquired property, and, therefore, descendible to his widows, and failing his widows, his daughter in preference to his nephew. The result of that decision was that *Shivagunga* passed from the line of *Muttu Vaduga*, who in 1829 had transferred the polygarship of *Padamattur* to his next younger brother *Muttu Sami*.

In the present case the Defendants, relying in some degree upon the final decision in the *Shivagunga* case, by their written statement insisted that the title of the widow of *Dhorai Pandian* to succeed to *Padamattur* on the death of her husband was preferable to that of the Plaintiff. They founded this contenton upon the transaction of 1829, whereby, as they alleged, *Muttu Vaduga* absolutely abandoned and renounced all his right to *Padamattur* in favour of *Muttu Sami*. They also alleged that for some time prior to 1829 and since, the three brothers were divided in estate and interest, and were living as divided members of a Hindu family. This part of the defence led to the settlement of the 2nd, 3rd, 8th, and 9th issues in the suit. The 2nd and 3rd are, "Whether *Muttu Vaduga* relinquished his interest in the estate sued for; and if so, what is the effect of such relinquishment upon the Plaintiff's title."

The 8th issue is, "If the Plaintiff be found son of *Muttu Vaduga*, whether *Muttu Vaduga* and the last owner of *Padamattur* were divided or undivided." The 9th issue is "Whether the Plaintiff was entitled to bring this suit during the lifetime of the last owner's widow." Those issues of course involved two distinct questions, namely, first, whether *Muttu Vaduga* was for all

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purposes separated from his brothers; and secondly, whether he had not at least so parted with all interest in *Padamattur* as to make that particular property as between his descendants and *Dhorai Pandian* the separate estate of the latter and so subject to the rule of succession affirmed by the decision of this Committee in the *Shivagunga* case. In the course of the trial a further objection was raised to the Plaintiff's case on facts which came out in the course of his cross-examination. That objection was briefly to this effect, that though he was the only surviving son of *Muttu Sami*, there were sons and grandsons of one of his elder brothers who, as the Defendants contended, would have a preferential title to *Padamattur* even on the assumption that *Padamattur* was to pass as joint property. That question, although no issue in the suit had been settled with respect to it, was distinctly raised by the grounds of appeal. The High Court nevertheless declined to adjudicate upon it, for the reasons stated in the passage of their judgment which has been already read. Their Lordships think that if there were not sufficient materials before the Court to enable the learned Judges to decide the question thus raised, they ought to have directed an issue in order that the facts essential to such determination should be ascertained.

Their Lordships will consider in the first instance the first of the two objections which have been thus taken to the Plaintiff's title, viz., the preferential title of the widow. In doing this they will assume that the Indian Courts have correctly found that after 1829 the status of the family, consisting of *Muttu Vaduga*, his two brothers, and their children, continued to be joint and undivided; and, consequently, that the only question is whether by reason of the transaction in 1829 the particular property of *Padamattur* ceased to be the joint property of the three brothers, and so upon the death of *Dhorai Pandian* became subject to the rule of succession already referred to, as affirmed by this Committee in the *Shivagunga* case. That question, of course, depends on the construction to be put on the instrument of 1829.

Now, various constructions have been put upon it. The first was that of the subordinate Judge. He says, "Although the relinquishment (taking it to be true) was thus rendered absolute,"—he is referring to the birth of the daughter of the deceased

zemindar of *Shivagunga*,—"and kept *Muttu Vaduganadha* and his offspring out of the *Padamattur* estate for a time, yet, as they were judicially pronounced to come into the *Shivagunga* estate as usurpers, and were ousted from it, *Muttu Vaduganadha's* heir or heirs are entitled to revert to the *Padamattur* estate." This construction, their Lordships think, cannot be maintained. There are no words which import a right of reversion. The true construction of the document cannot be affected by what happened subsequently. The grant, whatever its effect, was not necessarily avoided because subsequent events disappointed the expectation in which it was made, namely, that the estate of *Shivagunga* would remain in the line of *Muttu Vaduga*. One consequence of that construction and of the adoption of the doctrine of reverter might be to give force to the Defendant's second objection, because it would assume—if indeed such an assumption could be made consistently with what was ruled here in the *Tagore Case*—that a certain reversion remained in *Muttu Vaduga;* in which case it would be a grave question whether that reversion did not descend to his descendants in the direct line according to the law of primogeniture. Another construction was put upon the instrument by the High Court. Dealing with this part of the defence, the learned Judges say: "The Appellants' contention on this part of the case we understand to be that the instrument of relinquishment precludes all claims on the part of *Muttu Vaduganadha's* descendants that the family can no longer be regarded, as they admittedly were originally, as a joint and undivided Hindu family, and that under the terms of the *Limitation Act* XIV. of 1859, the Plaintiff's claim is barred, because *Muttu Vaduganadha* and his descendants are not shewn to have participated in the income or profits of *Padamattur* since the year 1829. Although the fact of the division of the family in or before the year 1829 was alleged by the defendants in their written statement, no evidence of this was adduced, and it is only from the mode of enjoyment of the property and from the effect attributed to the instrument of relinquishment that this is inferred. We think it clear that the family must still be regarded as a joint Hindu family, and that *Muttu Vaduganadha's* renunciation of his right in 1829, whatever its operation on himself and his descendants in

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possession of the zemindary of *Shivagunga*, cannot operate further, and that, upon the death of *Dhorai Pandian* without issue, the right of succession, which then opened to the members of this joint family, was not affected by such renunciation. The words 'We and our offspring shall have no interest in the said palayapat, but you alone shall be the zemindar, and rule and enjoy the same,' must be construed with due regard to the person using them, and the occasion when they were used. They refer to the estate and rights of the new so-called zemainder of *Padamattur*, and amount to a declaration that the palayapat shall be enjoyed by him exclusively, the *Shivagunga* zemindar disclaiming any joint interest. They are not a release by the latter for himself and his heirs of all future rights of succession, which might accrue to them as members of an undivided family." The last two sentences do not appear to their Lordships to be quite consistent. If the *Shivagunga* zemindar had disclaimed any joint interest, his words of renunciation taken alone would seem to imply that he had given up whatever interest he had, as a member of the joint family, in that estate. Their Lordships agree that such a renunciation would not deprive the descendants of *Muttu Vaduga* of such future rights of succession as they might afterwards have to that property, treating it as separate property *quoad* them,—such a right of succession, for instance, as might accrue to them in the present case upon the death of the widow. But it does seem to be inconsistent with the retention by them, "of all future rights of succession which might accrue to them as members of an undivided family." The construction of the instrument for which Mr. *Cowie* argued at the bar does not substantially differ from that of the High Court. He contended, as their Lordships understood, that the only effect of the transaction was to transfer the ostensible headship of the family, as regarded *Padamattur*, to the second brother and his direct descendants, and so virtually to reduce the position of *Muttu Vaduga* and his heirs to that of a junior line. This, however, is not the construction which, after some doubt, their Lordships think must be put upon the document. The heading of it is in these words: "Agreement passed on" such a day "by me, *Oiya Tevar's* son, *Muttu Vaduganadha Tevar*, of *Padamattur*, in favour of my brother, *Gouri Vallabha Tevar*." It

proceeds thus: "My junior paternal uncle, *Muttu Vijaya Raghunadha Gouri Vellabha Peria Udaya Tevar*, zemindar of *Shivagunga*, having departed this life, leaving no male issue, I have become entitled to the said zemindary, and you, as my next younger brother, are appointed zemindar of the palayapat of the said *Padamattur*." It then refers to the pregnancy of one of his uncle's wives, and says, "I shall act as usual in the matter in the event of her giving birth to a son." Those words shew that where the grantor meant to make a gift on a condition he knew very well how to express what the condition was to be; and this affords an additional argument against the construction put upon the document by the subordinate Judge. Then follows this clause: "But should she be delivered of a daughter"—an event which happened—"I and my offspring shall have no interest in the said palayapat, but you alone shall be the zemindar, and rule and enjoy the same, allowing at the same time, as per former agreement, to the younger brother, *P. Bodhagarusami Tevar*,"—who in the pedigree is called *Chinna Sami*,—"the village that has been assigned to him before." Now the plain meaning of those words seems to their Lordships to be that *Muttu Vaduga* renounces for himself and each of his descendants all interest in the palayapat, either as the head or as a junior member of the joint family, whilst at the same time he reserved expressly the rights of the youngest brother, *Chinna Sami*. The effect, therefore, of the transaction, in their Lordships' opinion, was to make this particular estate the property of the two instead of the three brothers, with, of course, all its incidents of impartibility and peculiar course of descent, and to do so as effectually as if in the case of an ordinary partition between the brother, on the one hand, and the two younger brothers on the other, a particuliar property had fallen to the lot of the two.

This construction seems to their Lordships to be strengthened rather than weakened by the subsequent clause as to the debts. He says, "As regards any debt contracted by me during the time that I was zemindar of the palayapat you shall have no concern at all therewith, but I shall myself be responsible for the same." That clause reads as if he wished to transmit the palayapat, in which he had abandoned all interest, to his brothers, cleared of

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the debts incurred by himself as polygar, whatever might have been their nature, and whether they were a charge upon the estate or not. Their Lordships see no great improbability in such a transaction. *Muttu Vaduga* believed himself to be, by a title not then disputed, the proprietor of the large and valuable estate of *Shivagunga*. He might therefore well be content to abandon in favour of his brothers all his interest in the comparatively inconsiderable sub-tenure of which, as zemindar of *Shivagunga*, he had become the superior landlord. That he should have done so and have afterwards lost *Shivagunga* was, no doubt, a misfortune for his family, and would be the greater subject of regret if the polygarship of *Padamattur* now carried with it anything more than the right of disputing transactions which were very possibly entered into by the parties in the *bonâ fide* belief that *Dhorai Pandian* had become sole owner of the estate; as, if their Lordships' construction of the document is right, he would have become upon the death of *Chinna Sami* without issue. But this unfortunate consequence cannot, in their Lordships' view, affect the construction of the document, which must be considered by the light of the circumstances as they existed at the time of its execution.

Again, their Lordships may observe, their construction of the instrument in somewhat corroborated by what seems to have been the understanding of the family. It appears that in the suit in which *Muttu Vaduga's* eldest son, *Muttu Sami*, and *Chinna Sami* were sued together for debts alleged to be a charge upon the palayapat, both the first and the second Defendants invoked the transaction of 1829, the first contending that as his father had transferred the estate to his brothers, the second and third Defendants, he was no longer responsible for the debt; *Muttu Sami*, on the other hand, relying on the clause in the deed of 1829 by which *Muttu Vaduga* had agreed to take such debts upon himself.

Then, again, in the cases in which *Chinna Sami* first, and afterwards his widow, were so ill-advised as to raise the question of the partibility of *Padamattur*, the suits seem to have been brought against the representatives only of *Muttu Sami*, and the representatives of *Muttu Vaduga* are treated as having no interest in the

matter. And, lastly, their Lordships' construction is in some degree further confirmed by the acquiescence of the Plaintiff himself for nearly twelve years in the conveyances and transactions which he now seeks to impeach.

Their Lordships then have come to the conclusion that, as between the descendants of *Muttu Vaduga* and *Dhorai Pandian*, the palayapat was the separate property of the latter; that on the death or *Dhorai Pandian*, his right, if he had any left undisposed of in the property, passed to his widow, nothwithstanding the undivided *status* of the family; and that therefore the case was one to which the rule of succession affirmed in the *Shivagunga Case* applies.

It follows therefore that their Lordships dissent from the finding of the two Indian Courts on the ninth issue, and hold that the Plaintiff had no title to sue in the life of the widow of *Dhorai Pandian*. This being so, it is unneccesary to consider the other objections taken to the Plaintiff's title. That objection involves considerations of some difficulty which pershaps could hardly be satisfactorily determined without further evidence as to the customary rule of succession to *Padamattur*.

Their Lordships will humbly advise Her Majesty to reverse the decrees of both the High Court and the subordinate Court, and to dismiss the three suits, with costs, in both Courts. The Appellants must also have their costs of the appeals; but in taxing those costs the Registrar must set off against the amount of costs payable by the Respondents the taxed costs of the application to bring in fresh evidence, which were in any case to be borne by the Appellants.

Solicitors for the Appellants: *Gregory, Rowcliffes, & Co.*
Solicitors for the Respondents: *Burton, Yeates, & Hart.*

J. C.* SETH GOKULDASS GOPULDÁSS . . . PLAINTIFF;

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AND

Feb. 14; *March* 12. MURLI AND ZALIM (HEIRS OF TARAPAT) . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

Interest on Decree—Execution.

Interest upon a decree cannot be levied in execution where the decree is silent as to subsequent interest on the amount decreed; but may be recovered by a fresh action instituted for that purpose.

Pillai v. *Pillai* (1) appproved.

APPEAL from a decree of the Judicial Commissioner of the Central Provinces of *India* (Sept. 7, 1875) affirming a decree of the Comissioner (March 12, 1875) which affirmed a decree of the Deputy Commissioner (Nov. 24, 1874) which dismissed the Appellant's suit or claim with costs.

The facts are stated in the judgment of their Lordships.

Leith, Q.C., and *Norton*, for the Appellant.

The Respondents did not appear.

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March 12. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decree of the Judicial Commissioner of the Central Provinces of *India*, in a suit instituted by the Appellant against the Respondents in the Court of the Deputy Commissioner of *Jubbulpore*, for the foreclosure of a mortgage.

The following are the circumstances under which the mortgage was executed:—On the 27th of June, 1859, the Appellant obtained a decree in the Court of the Sudder Ameen of *Jubbulpore* against *Tarapat Patel*, Malguzar of *Khairi*, the father of the

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep. 2 Ind. Ap. 219.

Defendants, for the sum of Rs.9,413. 15*a*. 3*p*., being the balance of principal and interest due upon a bond executed by *Tarapat* and the costs of suit. The decree was silent as to the payment of future interest on the amount decreed. By the bond upon which the decree was obtained, it was expressly stipulated that interest should be paid at the rate of 1 per cent. a month.

Between the date of the decree and the 27th of June, 1865, the Plaintiff endeavoured on several occasions to obtain payment of the amount decreed, and did in fact realize portions of the amount under two several executions. It is unnecessary to enter into any details of the proceedings adopted by the Plaintiff, or of the litigation which ensued upon them. It is sufficient to state that in their Lordships' opinion no laches can be imputed to the Plaintiff in endeavouring to enforce the decree.

In February, 1865, the Plaintiff applied to the Court of the Deputy Commissioner of *Jubbulpore*, against the Defendants and their father, *Tarapat*, for an attachment and sale of their rights in the village of *Khairi* in execution for the sum of Rs.13,498. 9*a*. 9*p*. claimed to be due under the decree.

That sum included interest on the amount of the decree calculated up to the 14th of October, 1863, after giving credit for payments made on account. Upon that application the Defendants and their father were ordered to be summoned, and upon their non-appearance an order was made on the 25th of July, 1865, for the attachment of their proprietary rights in the village, and for the sale thereof by public auction, after due notice, according to sects. 248 and 249 of Act VIII. of 1859.

On the 3rd of August in the same year orders were issued that the requisite notifications, according to sect. 249, be issued, and that the sale of the right and interest of Defendants in the village of *Khairi* should take place on the fortieth day from that date.

On the 4th the present Defendants presented a petition to the Deputy Commissioner praying to be relieved from liability for the Plaintiff's claim, and that the attachment might be removed from the village. Upon that petition an order was passed refusing to alter the order already made, and stating that as the Defendants had failed to appear on the date appointed for hearing, the case had been disposed of in their absence, the reason why they had

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absented themselves not having been explained. From that order they appealed to the Commissioner, and their appeal was rejected.

On the 18th of September, 1865, the mortgage upon which the suit was brought was executed. It was by conditional sale in the following words:—

"*Seth Khusalchand* and *Gokuldass*, of *Jubbulpore*, Plaintiffs; v. (1.) *Tarapat*, (2.) *Murlidbar*, (3.) *Zalim Singh*, *Patel*, residents and malguzars of the village *Khairi*, perganna *Patan*, Defendants.

"Claim

"Execution of Decree for Rs.13,498. 9*a*. 9*p*.

"We, *Tarapat*, *Murlidbar*, and *Zalim Singh*, patels and residents of *Mouzah Khairi*, defendants, are the writers of this agreement.

"The Plaintiffs above-named having taken out execution of a decree for the sum above-mentioned, and applied for attachment and sale of the village *Khairi*, the 13th of September, 1865, was first appointed as the date for the sale of the village in accordance with orders from the Judicial Commissioner. Subsequently the 18th of the said month had been fixed as the date for sale, in liquidation of a sum of Rs.16,498 9*a*. 9*p*.

"We have now brought the Plaintiffs to terms, and having gone into the accounts, we agree to pay Plaintiffs as principal, interest, costs, and future interest on the decree, in all 19,000 Government Sicca rupees.

"Of this we have caused Rs.5000 to be paid by *Naraindas* and *Raghoonath*. This leaves a balance of 14,000 Government rupees, which we agree to liquidate, paying no interest, by yearly instalments as detailed below, and until the liquidation of the whole amount due we hereby mortgage or conditionally sell the village in question, the condition being that in the event of our failing to pay any one of the instalments agreed upon the sale of the village shall become absolute; we and our heirs would then forfeit all proprietary rights in the village, and such rights would be transferred to Plaintiffs, to be thenceforward enjoyed by them and their descendants. Should, however, the failure on our part to pay the instalments in arrears be attributable to unfavourable

seasons, &c., the said instalments will be payable next year, and will bear interest at 1 per cent.

"Should the payment in arrears be not made in the next year, along with the one due for that year, the sale of the village will be considered absolute. The terms of this deed of sale would be binding on our heirs and representatives also, and so long as the money due to Plaintiffs remains unpaid, the village shall not be transferred by us to any one else; any such transfer, if made, shall be held to be illegal.

"We relinquish all claims to any money which the Plaintiffs may have recovered at the time of the sale becoming absolute."

The details of the instalments were for the payment on the 15th Aghan-Sambat, 1922, corresponding with the year 1865, of the sum of Rs.2000., and on Jeth 15 in each of the following twenty years, of the sum of Rs.600., making a total of Rs.14,000.

On the same 18th of September, 1865, *Tarapat*, the father, each of the Defendants and the Plaintiff respectively, made the following statements, viz.:—

"*Tarapat*, Defendant, son of *Mahadeo*, caste *Koormee*, aged fifty years, malguzar, resident of *Khairi*, states on solemn affirmation:—

"'We have effected a settlement of his claim with the Plaintiff by hypothecating our village, and fixing instalments for the liquidation of the same, and beg that our village be released from attachment.' 18th September, 1865.

"*Murli*, Defendant, son of *Tarapat*, caste *Koormee*, aged twenty-eight years, resident of *Khairi*, malguzar, states on solemn affirmation:—

"'Having effected a settlement of his claim with the Plaintiff by fixing instalments for its liquidation, I beg that the village be released from attachment. We have hypothecated our village as a guarantee for the liquidation of Plaintiff's claim.' 18th of September, 1865.

"*Zalim*, Defendant, son of *Tarapat*, caste *Koormee*, aged twenty-one years, resident of *Khairi*, mulguzar, states on solemn affirmation:—

"'We have fixed instalments for the payment of the Plaintiff's

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claim, and beg that our village be released from attachment. We have mortgaged our village to Plaintiff.' 18th of September, 1865.

"*Seth Khusalchand*, son of *Sawaram*, aged sixty-two years, caste *Maheshree*, resident of *Jubbul*, and a mahajun by profession, states on solemn affirmation :—

"'I have taken out execution of a decree against *Tarapat Murli*, and *Zalim*, and their village was about to be sold. The Defendants have, however, made an amicable arrangement for the liquidation of my claim by agreeing to pay instalments, which I have approved. I have no objections whatever, and I beg that the arrangements be sanctioned by the Court, and the village released from attachment. The Defendants have hypothecated the village, and I wish that it should remain so hypothecated, and the case be struck off the file.' 18th September, 1865."

The mortgage was on the same day presented by the Defendants to the Extra Assistant Commissioner, who forwarded the case to the Court of the Deputy Commissioner, who thereupon, on the 19th of September, 1865, ordered that the kistbandi be sanctioned and the case struck off the file as completely disposed of.

The Defendants continued to pay the instalments under the mortgage up to 15th Jeth, 1929, but failed to pay the instalments which fell due in Sumbat 1930 and 1931, whereupon the Plaintiff on the 24th of October, 1874, filed his plaint and prayed for a decree for Rs.7800, the amount of the instalments remaining unpaid, with a proviso that in the event of the same not being paid up within one year, the rights and interests of the Defendants and their deceased father in the village in question be transferred to Plaintiff, the transaction being then considered as one of an absolute sale.

The Defendants in their written statement alleged, amongst other things, that in June, 1859, a money decree for Rs.9413. 15*a*. 3*p*. was passed against *Tarapat*, their father, and that future interest on the decree was not allowed; that the Plaintiff, however, fraudulently went on executing the decree with interest, and eventually, in September, 1865, induced *Tarapat* and the Defendants to execute the deed sued on by dishonestly concealing the fact that future interest had not been decreed.

They also stated that they were ignorant people, and that they executed the deed under a mistake of fact, *i.e.*, under the impression that future interest had been decreed as represented by the Plaintiff; that at the time when the deed was executed only Rs.3798. 4*a.* 9*p.* were due under the decree, and that the Defendants were minors at the time of the execution of the deed.

The plea of minority was found against the Defendants, but the Deputy Commissioner dismissed the Plaintiff's suit with costs, upon the ground that the claim was based on an illegal contract. He held that even if the Plaintiff had a right to demand the sum of Rs.13,498, 9*a.* 9*p.* for which execution had been awarded, there was not sufficient explanation as to how that amount was increased to Rs.16,498; and further, that even if, as the Plaintiff's counsel had suggested, the Plaintiff in making up the accounts with Defendants added interest for the period from October, 1863, to the day fixed for the sale of the village in execution, that alone was sufficient to vitiate the contract, for, in the view of the Deputy Commissioner, it was evident that the Plaintiff was well aware that he had no real claim to interest. But he went further, and held that the Plaintiff was not entitled to any interest on the decree; that Rs.4820 only were due; and that the Plaintiff, by concealment of facts regarding the amount due, and by misrepresentation of facts, as shewn by the proceedings in the original case, and the application for execution for Rs.3000 in addition to the Rs.13,498 were sufficient grounds for considering that the transactions out of which the contract grew were unlawful.

Upon appeal, the Commissioner was of opinion that there was no sufficient evidence of concealment, but that there was misrepresentation with regard to Defendant's liability to interest within the meaning of definition 1, sect. 18, of the *Indian Contract Act*, No. 9, of 1872. He further held that the bond was nothing more than a kistbundi; that no new consideration for it was given; that if the parties had arranged that effect should be given to it by the executing Court, it would have been pronounced invalid, as it altered the terms of the decree by the addition of interest, which could not be done even with consent of the parties. He therefore held that the contract was illegal and void under clause 2, sect. 23, of the *Indian Contract Act*, and dismissed the appeal with costs.

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A special appeal was preferred to the Judicial Commissioner, who dismissed it with costs, on the ground that the deed was voidable under sect. 20 of the *Indian Contract Act*, inasmuch as both parties were under a mistake of fact essential to the agreement expressed in it. Their Lordships are of opinion that there was no sufficient evidence to prove a fraudulent misrepresentation or concealment of facts on the part of the Plaintiff. There was, no doubt, a mistake of law on the part of the Defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realisation, no such interest having been awarded by the decree. But that mistake appears to have been common, not only to the Plaintiff and the Defendants, but also to the Assistant Commissioner, by whom the order of the 25th of July, 1865, was made for the attachment and sale of the village in execution for the sum of Rs.13,498. 9*a*. 9*p*. Indeed, until the Full Bench ruling of the High Court of *Bengal* in September, 1866, in the case of *Mosoodun Lall* v. *Bheekaree Singh* (1), the principle of which was upheld by the Judicial Committee in the case of *Pillai* v. *Pillai* (2), there were conflicting rulings upon the point whether interest upon a decree could be levied in execution when the decree was silent as to subsequent interest on the amount decreed.

In that uncertain state of the law, the Defendants not having appeared to shew cause, an order was in fact made for the attachment and sale of the village in execution for the sum of Rs.13,498. 9*a*. 9*p*., which included interest on the decree. No appeal was preferred against that order, nor were any other proceedings adopted to set it aside. It remained in force up to the time of the mortgage, and the village had been actually attached and was liable to be sold under it if the compromise had not been effected and the mortgage executed. Their Lordships are of opinion that the mortgage was not invalid either upon the grounds stated by the Commissioner or upon that stated by the Judicial Commissioner. It appears to have been executed by way of compromise, after an examination of the accounts at which the father *Tarapat* was present; and it does not appear to their Lordship that, subject to what will hereafter be said as to a sum of Rs.3000, part of the money secured, the Plaintiff gained any un-

(1) 6 Suth. W. R. Mis. Rul. 109. (2) Law Rep. 2 Ind. App. 228.

conscionable advantage by the transaction; for although he was not strictly entitled to an execution for interest calculated for a period subsequent to the date of the decree, there seems to be no reason why he should not have recovered interest as damages in an action upon the decree if he and the Court which issued the attachment had not mistaken his remedy. It is not necessary to refer to the English decisions bearing upon the subject of recovering by action interest upon a judgment which cannot be levied by execution. In the case of *Pillai* v. *Pillai* (1), to which reference has already been made, the Judicial Committee, in reference to the question of levying interest upon a decree where the decree was silent as to future interest, stated expressly that questions of that nature might be raised by separate suit.

It may be remarked that the rate at which interest was calculated for the period between the execution of the mortgage and the times fixed for the payment of the instalments was extremely low.

It appears, however, to have been assumed that the sum for which the village was liable to be sold in execution was not Rs.13,498. 9*a*. 9*p*., but Rs.16,498. 9*a*. 9*p*.

The recital in the mortgage is, "Subsequently the 18th of the said month had been fixed as the date for sale in liquidation of a sum of Rs.16,498. 9*a*. 9*p*." As to this the Judicial Commissioner says: "In the first Court's judgment the larger sum of Rs.16,498. 9*a*. 9*p*. is referred to as entered in one of the processes of execution, viz. 'the notice of sale,' but the extant record of proceedings nowhere mentions such a sum. If such a sum was ever entered in such a process it must apparently have been only through a clerical error." Although there does not appear to have been any wilful misrepresentation in this respect by the Plaintiff, their Lordships are of opinion that there was no authority under sect. 249 of Act VIII. of 1859 for increasing the amount for which the village was ordered to be sold in execution from Rs.13,498 to Rs.16,498; that the addition has not been satisfactorily explained; and that the deed ought to be reformed by disallowing the additional sum of Rs.3000. This will reduce the sum secured by the mortgage by Rs.3000, and a proportionate part of the sum allowed for future interest during the period

(1) Law Rep. 2 Ind. App. 219.

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stipulated for payment by instalments, which may be taken in round numbers as together amounting to Rs.3480. Deducting Rs.3480, and the eight instalments of the Rs.14,000 which have been paid, amounting to Rs.6200, from the total amount of Rs.14,000 secured, there remains the sum of Rs.4320 to be paid by the Defendants to the Plaintiff in order to redeem the above-mentioned village.

Their Lordships will therefore humbly advise Her Majesty that the decrees of the three Lower Courts be reversed; that in the event of the Defendants paying to the Plaintiff the sum of Rs.4320, together with the costs of the Plaintiff in the three Lower Courts, within one year from the time of the service upon them of notice of such order of Her Majesty in Council as shall be made in this appeal, or in the event of their paying into the Court of the deputy Commissioner of *Jubbulpore* within that period the said sum of Rs.4320. together with such costs as aforesaid for the use of the Plaintiff, the said village shall be freed and discharged from the said mortgage; but that in the event of the said sum of Rs.4320 together with such costs as aforesaid, not being paid to the Plaintiff by the Defendants, or paid by them into the said Court for the use of the Plaintiff within the period aforesaid, the said mortgage and conditional sale shall become absolute, and all the right, title, and interest of the Defendants in the said village shall be transferred to and vested in the Plaintiff; and in order that due notice of such Order in Council shall be given to the Defendants, their Lordships will further advise Her Majesty that the Plaintiff be ordered to lodge the said decree of Her Majesty in Council in the Court of the deputy Commissioner of *Jubbulpore*, in order that notice thereof may be given to the Defendants in due course, and that the Plaintiff do also deposit in the said Court such an amount as may be required to defray the costs of serving upon the Defendants notice of the said order.

Considering the peculiar circumstances of this case, and also the fact that the Plaintiff has not succeeded to the full extent of his claim, their Lordships are of opinion that the Respondents ought not to be ordered to pay the costs of this appeal.

Solicitors for the Appellant: *Merriman, Pike, & Merriman.*

SHEO SINGH RAI . . . . . DEFENDANT;

AND

MUSSUMUT DAKHO AND MOORARI LALL PLAINTIFFS.

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March 5, 6, 8; *April* 13.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Jain Law—Proof of Custom—Widow's Estate—Adoption—Objection to Decree as declaratory precluded, Special Leave having been granted on other Grounds.

In a suit to establish a Jain widow's (under the usages and customs of the Saraogee religion) right of inheritance to her husband's estate, and to uphold her adoption of her daughter's son, as well as his right to succeed her after her death, by voiding the pretensions of the Defendant (brother of the deceased proprietor), who claimed as next of kin under Hindu law and under a nuncupative will alleged to have been made in his favour:—

Held, that although ordinary Hindu law, in the absence of proof of special customs, has usually been applied to persons of the Jaina sect in *Bombay*, yet the Jains possess the privilege of being governed by their own peculiar laws and customs when the same are by sufficient evidence capable of being ascertained and defined and are not open to objection on grounds of public policy or otherwise:

Held, on the evidence, that

(*a.*) A sonless widow of a Saraogee-Agarwalas takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus, to the extent at least of an absolute interest in the self-acquired property of her husband.

(*b.*) A sonless widow also enjoys the right of adoption without the permission of her husband or the consent of his heirs.

(*c.*) A daughter's son may be adopted, and on adoption takes the place of a begotten son.

Although it is not an invariable rule that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal, yet where special leave had been obtained on the ground that important questions affecting a large community were involved in the decision sought to be appealed from, the Appellant was *held* to be precluded from objecting to the decrée on the ground of its being declaratory only.

A right to come to the Court to have a document or act (*e.g.*, a claim under a nuncupative will) which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstructions, would be sufficient to sustain a declaratory decree.

APPEAL from a decision of a Divisional Bench of the High Court for the North-Western Provinces (Nov. 27, 1874), passed after two remand orders made in the suit.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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The first Respondent was originally the sole Plaintiff below, and her suit was dismissed by the first Court, being that of the Judge of *Meerut*, on the 31st of May, 1872. On appeal to the High Court the case was remanded to take further evidence, when the Judge, having made the second Respondent a party to the suit, decided in favour of the Respondents; and this decision was afterwards, with some variation, affirmed by the High Court in the decision appealed from.

The questions in the case were as to the laws governing Jains of the Saraogee caste or sect as regards the right of a sonless widow of a Saraogee Jain to adopt without authority from her husband or the consent after his death of his nearest relative, and as to the estate and rights of her and of her adopted son after her making such adoption.

The facts of the case, the circumstances out of which the suit arose, and the pleadings, are sufficiently set forth in the judgment of their Lordships.

On the 27th of November, 1874, the High Court (*Turner* and *Brodhurst*, JJ.) delivered the judgment under appeal, which contained the following review of the decisions in *India* relating to the laws and customs of the Jains:—

"The Appellant contends that the applicability to Jains of the laws of the Brahminical Hindus, or what is generally termed Hindu law, has been established by so many rulings that this Court is bound to apply it in this case. As has been before mentioned, in remanding this suit for trial this Court expressed its opinion that the customs of the Jains should be ascertained by investigation, thus intimating that it was not to be assumed that the Hindu law applied; and on considering the rulings which have been cited by the learned counsel and pleaders at the Bar of the Court, we come to the conclusion that so far from constraining the Court to apply the Hindu law to Jains where there is reliable evidence that the customs of the sect are at variance with that law, the weight of authority requires us in such cases to give effect to the particular customs of the sect.

"The earliest case brought to our notice is *Maharajah Govindnath Roy* v. *Gulal Chand and Others* (1), decided by the Presidency

(1) 5 Sel. Rep. 276.

Sudder Court, in 1833. In that case *Utam Chand*, a Jain, had in a letter addressed to *Motee Chand*, authorized his wife to adopt as a son a person to be selected by *Motee Chand*, and had directed that his estate should be made over to the son so adopted. *Motee Chand* died without having made a selection, and *Maya Cumari*, *Utam Chand's* widow, adopted *Gulal Chund*, whom after some years she put in possession of her husband's estate, and subsequently, on the ground of misconduct, ousted from the estate, claiming that she was entitled to resume it by reason of his misconduct. After the adoption, and prior to the resumption of the estate by the widow, she had defended a suit, brought by a stranger, who claimed a portion of the reputed estate of her husband, and assented to a compromise, whereby a portion of the property claimed was surrendered. *Gulal Chand* then sued to recover possession of the estate and to set aside the compromise. The validity of the adoption being questioned in appeal to the Sudder Dewany Adawlut, the Judge, Mr. *C. T. Sealy*, took the opinion of the pundit of the Court, who reported that by Jain law 'a sonless widow may adopt a son just as may her husband for the performance of rites, that the sanction of her husband or the direction of the yats or priests is not essential, that an elder son may be adopted as a son, and that the age qualifying for adoption extends to the thirty-second year.' Before the case was decided, Mr. *Sealy* left the Presidency Court, and Mr. *Walpole*, before whem the case then came, recording his opinion that by Jain law the adoption was valid, and that the pundit seemed to support a right of disposition as vested in the widow, and that a question arose whether the widow was competent to aliene the property surrendered by the compromise, directed the Judge of *Moorshedabad* to obtain an exposition of the Jain Shastra on these points from some impartial yats (priests). Of four Jain priests consulted in consequence of this direction, three gave their opinion that the widow, as manager, was competent to make the compromise and to depose *Gulal Chand*, if he had been guilty of any impropriety opposed to the religious tenets of the Jains. The fourth priest who dissented in part from these *dicta*, pronounced an opinion which was subscribed by two other Jain pundits, to the effect following:—'A widow is not competent to

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aliene her husband's estate—existing an adopted son. The pundits have written that a widow may depose an adopted son; this is not correct. The authorities allow of such deposition in the case of a Swaichha son, or one chosen by the wife without sanction of her husband and the gurus. If he be destitute of virtue, she may depose him. It is also incorrect that the widow, by way of compromise, can alienate her husband's property, for such doctrine is opposed to the Jain Shastras—in case a minor son, lineal or adopted, exist. So likewise it is erroneous, as asserted by the pundits, that the widow existing a son is competent to perform every act.' Eventually, the Judge of the Sudder Dewany Adawlut set aside the compromise, holding that the adoption was valid, that the adopted son could not be bound by the decree obtained in a suit to which he was not a party, and that the widow was estopped by a compromise she had made with the adopted son *pendente lite* from asserting the deposition of the adopted son.

"Some observations were made by the learned Chief Justice of *Bombay* (see 10 *Bombay* H. C. R., p. 255) on the expression used by the pundit of the Court in delivering his opinion that the widow might adopt 'for the performance of rites.' It may be assumed that the pundit was an orthodox Hindu, and he may have been misled by his more intimate acquaintance with his own law to attribute to adoption among the Jains an object which is foreign to it. At present we are only concerned with the case so far as it affords an instance in which the Courts of this country have not felt constrained to apply the ordinary rules of orthodox Hindu law to Jains, but have grounded their decision on the result of an investigation into the customs of the sect.

"We propose to consider next the rulings of the Courts in these provinces.

"In *Mussamat Chunnee Baee*, and *Sooja Baee* v. *Mussamat Gubboo Baee* (1) the Sudder Court, North-Western Provinces (Messrs. *Begbie, Brown, and H. B. Harrington*), observed that it was unnecessary to refer to the pundit of the Court for an opinion as to the Jain law on a question arising between Jains, when his authority as the expositor of the doctrines of a professedly dissenting sect was impugned by one of the parties, and that the course pursued was

(1) S. D. A., N. W. P., Rep. 1853, p. 636.

a proper one, namely, of leaving it to the Plaintiff to establish by any means in her power the exemption of her sect from the orthodox doctrines, which was a question of fact to be tried and decided on the proofs of the parties, and the judgment proceeds:

" 'Accordingly a large body of evidence was adduced on this point, on the side of the Plaintiff, comprising the depositions of a number of persons of the same persuasion, together with a statement delivered by a law officer of the Court in another case in which it was distinctly declared that the Saraogees, as followers of *Parus Nauth*, differed materially in their creed and worship from the orthodox Hindus, and that the difference was so essential that the proximity of their temples to those of the orthodox Hindu was forbidden in the provinces. The Court finds the same view of the tenets of the Saraogee sect taken in a book published by authority where the Sarawukwanees or Saraogees are described as following the Jyn Dhurm in contradistinction to religious tenets of the worshippers of Vishnoo, and their supreme muth is stated to be situated at *Delhi* (1). The decision of the Presidency Court of the 23rd of March, 1833, has recognised the broad distinction between the tenets and usages of the Jain sect and the rest of the Hindu community, and the right of the members of the former persuasion to an adjudication of matters in dispute regarding questions of inheritance on their own shastras.' Adopting this principle of decision, the Court held it proved by the best evidence obtainable that the usages of the Jain sect did not impose the same condition as the Hindu law respecting ages as a qualification for adoption, and it also held that on the death of an adopted son without issue in the lifetime of his adoptive mother, the right of further adoption vests in the widow, and does not revert to the adoptive mother, observing 'that the want of any standard authority for the law of the Jain sect had compelled the Lower Court to have recourse for the elucidation of the point to the evidence of witnesses of the same creed, in confirmation of an opinion to the same effect delivered by a jatee or high priest of the sect.'

(1) Summary of the law and customs of Hindu castes, published by order of the Honourable the Governor in Council of Bombay, in the year 1827, p. 101.

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Again in *Munnoo* v. *Gokul Pershad* (1) the Sudder Court, North-Western provinces (Messrs. *Money* and *Morgan*) ruled that questions of inheritance between the parties who were Saraogees should be ascertained on the best evidence procurable, and the suit was remanded that it might be so decided, and when, after a new trial, it again came before the Sudder Court (Messrs. *Lean* and *Ross*) (2), the Court after stating it was admitted by both parties that the Saraogee sect have no 'scriptures,' religious or legal, whereby such points (questions of inheritance) could be authoritatively decided 'considered it' clearly 'established that their social and domestic laws, while resembling generally those of the orthodox Hindus, are regulated by immemorial custom, which on the occasion of a dispute arising can only be ascertained by the evidence of intelligent and influential members of the sect, and consequently it held, in accordance with the great preponderance of evidence, that the rights of an adopted son, according to the laws and customs in force among Saraogees, are in all respects the same as those of a begotten son, and that he is entitled to inherit from collaterals.

"In an unreported case, *Hoolas Raee* v. *Bhowani and Others*, decided by the Sudder Dewany Adawlut North-Western Provinces (Messrs. *Roberts* and *Edwards*) on the 7th of November, 1864, the point at issue was, whether the widow of a Saraogee succeeded to and was competent to alienate the ancestral and undivided real estate of her husband. The Judge of *Meerut*, knowing that the Jains at *Delhi* were a wealthy and respectable community, framed and sent to the Deputy Commissioner at *Delhi* the following questions, requesting him to ascertain from undoubted Jain authority the law by which the Jains were governed on the points suggested by the questions:—

"'Does the Saraogee sect observe the Hindu law or no?'

"'If they do not observe Hindu law, does their law allow a widow to alienate the real property ancestral and undivided left to her by her husband? According to the rules of the Saraogee sect, has a widow absolute control and power of disposition, alienation, &c., over the real property ancestral and undivided left to her by her husband, or has she only a life interest in the property?'

(1) S. D. A., N. W. P., Rep. 1860, p. 263. (2) S. D. A., N. W. P., Rep. 1862, p. 51.

"The Deputy Commissioner returned the following replies given by three Saraogees, whom he reported to be Sahookars (bankers) of great influence and respectability.

"'In religious matters the Saraogees observe the rules prescribed by their own Dhurm Shastras. The widow in the event of there being no issue is competent to alienate the whole property (many imaginable kinds of property) of her late husband, according to ancient usages and the custom of the brotherhood, a widow has absolute power (iktiar kamil) over real property ancestral and undivided left by her husband, as though it were personal property; just the same power that her husband had.'

"The Judge having received these opinions, adopted them, and held the widow competent to aliene the property.

"The Sudder Court in Special Appeal admitted an objection that the answers of the Jains who had been examined at *Delhi* were inadmissible in evidence, as they had not been taken on oath, and directed a re-trial, intimating that a fresh commission should issue in due form to *Delhi*, and that commissions should also be issued to *Benares* and any other places in the North-Western Provinces in which Jains were known to reside. At the hearing of the case which we shall next have occasion to mention, the Judges of the Sudder Court, North-Western provinces, desired to ascertain the result of the new trial which had been ordered, and in reply to an inquiry made by the Registrar the Judge of *Meerut* reported that the case had been decided by arbitration, that the arbitrators upheld the widow's right of alienation, that the decision was in substance and effect in accordance with the opinions of the residents of *Delhi*, and that the result of the commission to *Benares* shewed that the general opinion of the persons examined there was to uphold the same view.

"Adverting to the proceedings in this case, the Sudder Court (Messrs. *Edwards* and *Spankie*), in another unreported case, *Behari Lall* v. *Sookhasi Lall*, decided on the 16th of November, 1865, held that a Saraogee widow has the right to aliene her husband's share of undivided ancestral estate, and against the protest of the brothers of the deceased sustained an alienation made by a Saraogee widow and her son, who, it was alleged, had been adopted by his maternal grandfather.

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"In *Rikhab Dass* v. *Joogul Kishore* (1) the Defendant asserted that a Jain widow took an absolute interest in her husband's estate, and was competent to aliene it as she thought proper. The majority of the Judges held, not that the parties as Saraogees were subject to Hindu law, but that the Defendant was bound by the decision passed in another suit, in which he had as Plaintiff claimed certain property as devolving on him by the same gift on the same averment as to the Jain law, and his claim had in appeal been dismissed, the Appellate Court holding the Hindu law applicable.

"In an unreported case, *Heera Lall* v. *Mohun and Mussumat Bhiro*, decided the 24th of February, 1873, the Plaintiff sued to set aside the sale of a house by a Saraogee, alleging that it had been jointly acquired by his father *Choorun* and his uncle *Purma*, the husband of the widow. The Defendant justified the sale on the ground that the house was the sole property of *Purma*, on whose death the widow took, by the law of Jains, such an interest in his estate as entitled her to alienate it at her pleasure, and that she had effected the sale for purposes which, if Hindu law were applied to the case, would justify the sale, namely, to discharge a mortgage debt and to defray the expenses of her daughter's marriage. The Court of first instance found the house had been purchased by *Choorun* and *Purma*; that although there were instances in which Jain widows had been permitted to alienate their husbands' estates there was no sufficient proof of the custom, and holding that Hindu law was applicable, it declared the sale null and void.

"The Judge of *Agra* (Mr. *H. G. Keene*) found that the house belonged solely to *Purma*, and that the alienation had been admittedly made for legitimate family purposes, and relying on the rulings of the Sudder Dewany Adawlut, North-Western Provinces, to which we have adverted, he held that the case fell to be decided by the law of the Jains, and that Hindu law was no more applicable to Jains than to European Deists, but without ruling distinctly that the evidence was sufficient to prove that among Jains a widow was competent to aliene her husband's estate, he recorded a finding in the following terms:—

"'The Lower Court does not deny that evidence has been pro-

(1) S. D. A., N. W. P., Rep. 1865, p. 246.

duced to shew that alienation had been occasionally permitted to widows of that tribe.'

"The case was then brought before the Court in Special Appeal, the honourable Judges (*Pearson* and *Spankie*) before whom it came for hearing, state in their judgment that it was not contended by the Appellant that the Hindu law, as such, was applicable to Jains; but that the Hindu law and Jain law did not differ in respect of the interest taken by a widow in her husband's estate, and, quoting the paragraph in the decision of the Court below, which has been cited by us, they observed that occasional permitted instances were insufficient to establish a right by custom of alienation, and they remitted an issue as to the nature of the widow's estate under Jain law, and an issue as to the ownership of the house, to the Lower Appellate Court for further investigation. The Judge again held that the house was purchased by *Purma* alone, and that it was clear that in several instances where a widow and collateral heirs survived a Jain, the widow succeeded, and with a right of alienation. He found that this was proved not only by the witnesses for the Defendant, but by some of the witnesses adduced by the Plaintiff, who, while asserting generally that Hindu law applied to the Jains, 'admitted on cross-examination that they were unable to cite any case in which it did so, and were obliged to admit that they knew of cases where it had not.' Objections were taken to these findings, and the case coming before the same Bench, it was held by the High Court that the evidence only went to shew, and did not, in the opinion of the Court, satisfactorily prove that occasional alienations had taken place, and holding there was no sufficient proof of special custom, it declared Hindu law applicable. The High Court also differed from the Judge as to the original ownership of the property, and found it had been purchased by the brothers *Choorun* and *Purma* jointly. In the event it reversed the decree of the Lower Appellate Court and restored that of the Court of first instance.

"We have examined all the precedents of the Sudder and High Courts of these Provinces which have been cited in the course of the argument. Nothing is to be found in them which could be construed as constraining the Court to apply to Jains Hindu law, whatever be the evidence as to Jain custom, but, on the other

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hand, they go to shew that where a Jain has succeeded in establishing, by such proofs as are in the judgment of the Court sufficient, a custom of inheritance prevailing in his sect, then, whether the custom be at variance or in accordance with Hindu law, the Courts are bound to give effect to it, nor is there anything contradictory of this position to be found in the rulings of other Courts of *British India*.

"In *Lalla Mohabeer Pershad* v. *Mussamat Kundun Koowar* (1) (Sir *Barnes Peacock*, Chief Justice, and Mr. Justice *Louis Jackson*) the learned Chief Justice expressly stated that no evidence had been given to shew what, according to the usages among the Jains, are the rights of a widow as regards inheritance, and it was held that 'in the absence of evidence to prove that the rules of inheritance among the Jains are not the same as those of orthodox Hindus,' the Court could not say 'that the Jains are not governed by the Hindu law of inheritance applicable in that part of the country in which the property is situate, viz., the Dayabhaga in *Lower Bengal* generally, the Mitakshara in the Mitakshara districts and the Mithila country.'

"It will be observed that the Court did not declare it would not take notice of a Jain custom if proved, but that in the absence of proof of such custom the Hindu law of inheritance was applicable.

"To the same effect is the recent ruling of the High Court of *Bombay* in *Bhagvandas Tejmal* v. *Rajmal* (2), where it was alleged that by Jain custom after the widow's death the husband's heirs were entitled, with the consent of the punch, or leading members of the sect, to adopt a son to the deceased husband and to vest in him the estate. The Court refused to recognise the alleged custom, because it held it insufficiently proved. The Court observed 'that not a single yati or pundit or priest or other expert, either in the lore of the Jainas or the Brahmans, has been called to prove the alleged custom. The Plaintiff has failed to prove the existence of any such deviation from the Hindu law of this Presidency as he asserted;' and, on the other hand, it declared it accepted the ruling, that if the evidence of an uninterrupted general custom be satisfactory and above suspicion the Court is bound to give effect to the custom.

(1) 8 Suth. W. R. p. 116. (2) 10 Bomb. H. C. R. 241.

"With all the respect which Courts in *British India* owe to the eminent Judges by whom *Lalla Mohabeer Pershad* v. *Mussamat Kundun Koowar* (1) was decided, we cannot avoid the expression of a doubt whether, in the absence of proof of Jain custom, it was rightly held that the Jains are to be governed by the Hindu law of inheritance applicable in that part of the country in which the property is situate. This would be to apply to Jains a *lex loci* which is not applied to orthodox Hindus in matters of succession. In *Rutcheputty Duttue and Others* v. *Rajunder Narain Rae* (2) it was ruled by the Privy Council that succession in a Hindu family which had migrated from a district in which Mithila law was in force to a district in which it was not in force was governed by the Mithila law, it being proved that the family had retained the religious ceremonies and observances of the Mithila.

"The same principle of decision was adopted by the Privy Council in *Rani Sreemutty Dibeah* v. *Rani Koond Luta* (3), and in *Soorendro Nath Roy* v. *Mussamut Heeramonee Burmoneah* (4).

"In the *Kojahs and Memons' Case* (5) the late Chief Justice of *Bombay*, Sir *E. Perry*, in a most able judgment examined the principles by which Indian Courts should be guided in determining questions of succession arising between persons who are dissenters from the principal religious creeds in *India*. After examining the arguments of the jurists *Thebaut* and *Austen* on the origin and force of customary law, and declaring that 'the customs of castes are eminently personal, and are as clearly traceable and distinct in one locality as another,' the learned Chief Justice enunciated the following rule: 'It appears to me that if a custom has been proved to exist from time whereof the memory of man runneth not to the contrary, if it is not injurious to the public interests, and if it does not conflict with any express law of the ruling power, such custom is entitled to receive the sanction of a Court of Law.' And again: 'The conclusion I draw is, that if a custom otherwise valid is found to prevail among a race of Eastern origin and non-Christian faith, a British Court of justice will give effect to it if it does not conflict with express Acts of the Legislature.'

(1) 8 Suth. W. R. 116.
(2) 2 Moore's Ind. Ap. Ca. p. 132.
(3) 4 Moore's Ind. Ap. Ca. 292.
(4) 12 Moore's Ind. Ap. Ca. 81.
(5) Perry's Oriental Cases, 110.

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"In *Rithcurn Lallah* v. *Soojun Mull Lallah* (1) the son of a Jain living in *Madras* sought to enforce a partition in the lifetime of his father, founding his claim on Hindu Mitakshara law. Mr. Justice *Holloway*, in dismissing the suit, thus expressed himself:—'The condition of this people is the same as the condition of the people at the breaking up of the Roman Empire; and from their peculiar historical condition there is nothing like a *lex loci* applicable to them. . . . Have these people submitted to Hindu law? Mr. *O'Sullivan* says that the son succeeds his father. This, however, is elementary law, and is a generic point in all systems of of law. But see as to adoption among these Jains; it is different from that followed by the Hindus. It is a specific difference, for it is an adoption of majors, whereas Hindu law prescribes infant adoption. The Jain does not care for ceremonies, and therefore he adopts at any age. This difference is remarkable. Adoption is a religious element in the one law, it is not in the other. . . . . Even if Hindu law were applicable, I am not bound to apply the doctrines of the commentators to these people centuries after they had left the Hindu system.'

"Lastly, in *Abraham* v. *Abraham* (2) the Privy Council, in dealing with the case of Christian converts from Hinduism, declared that the regulations which prescribe that the Hindu law shall be applied to Hindus, and the Mohamedan law to Mohamedans, must be understood to refer to Hindus and Mohamedans not by birth merely, but by religion, and that the case fell to be decided by the rule of equity and good conscience. Applying that rule, their Lordships held that the course which had been adopted of referring the decision to the usages of the class to which the convert had attached himself and of the family to which he belonged, had been most consonant both to equity and good conscience; and the judgment contains the following passages, which appear to us to have a material bearing on the question we are now considering: 'Custom and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they be changed or lost by desuetude. . . . If the spirit of an adopted religion improves those who become converts to it, and they reject from conscience customs to which

(1) 9 Madras Jur. 21. (2) 9 Moore's Ind. Ap. Ca. 239.

their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictio juris* as still the enduring customs of the family. If it be so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience or interest? Surely in things indifferent in themselves the tribunals which have a discretion, and have no positive *lex fori* imposed on them, should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not."

"We have exhausted the authorities which occur to us on the question which lies at the threshold of this case. It appears to us that there are clearly no grounds for asserting that we are constrained to go the length the Appellant desires, and to hold that the Hindu law is to be applied whatever be the proved usage of the sect. It is also clear that the Court by whose decision all Indian Courts are to be guided has distinctly recognised the fundamental principle that in *British India* there exist sects of dissenters from the two creeds whose adherents are the most numerous, and that the laws of succession among these sectaries are to be determined, not according to any *lex loci*, but according to the proved usages of the sect; and it has been shewn that although in the absence of evidence of the particular customs of the Jains, Hindu law has been held applicable to them, it has never yet been ruled that they are to be deprived of the liberty accorded to every sect in this country in the absence of positive law, to require the Courts to determine their rights of inheritance according to the established usage of the sect. This Court then rightly instructed the subordinate Judge to inquire into the customs of the sect of which the parties to the suit are members, and to be guided by the result of that inquiry."

Doyne, and *Raikes*, for the Appellant, contended that inasmuch as the right of the original Plaintiff, *Mussumut Dakho*, to enjoy for her life the lands in suit had never been disputed or disturbed, she had no *locus standi* to maintain a suit of such a declaratory and prospective nature as that disclosed by the plaint: see sect. 15 of Act VIII. of 1859. The Appellant had never impugned that

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right, and in fact his only material interest was that if *Moorari* was validly adopted and married, and had no brothers and sisters, and died without issue leaving a childless widow, then such childless widow would have a title preferential to that of the Appellant. [SIR JAMES W. COLVILE:—In your written statement you seem to set up a present interest in the estate.] As the Plaintiff launched the suit it was hostile to *Moorari*—to her own daughter and the other children of that daughter, born or unborn. It was a mistake of the pleader to set up an absolute title on the part of the Defendant; but no evidence was called in its support, or to establish the alleged nuncupative will. The injustice to the Defendant was that he was burdened with all the costs of a litigation which had settled nothing. Reference was made to *Sreenarain Mitter* v. *S. Kiskensoonderee Dossee* (1); *Nilmony Singh* v. *Kallychurn Battacharjee* (2). [SIR MONTAGUE E. SMITH:—Setting up a will is an act, not an assertion.] *Kathama Natchiar* v. *Dorasinga Tever* (3); *Forbes* v. *Ameeroonissa Begum* (4); *Shah Mukkun Lall* v. *Sree Kishen Singh* (5).

Cowie, Q.C., and *Cowell*, for the Respondent, contended that some consequential relief could be given on what appeared in the suit, and that that was sufficient to found a jurisdiction to make a declaratory decree. If the existence of the jurisdiction was established, and the question was reduced to one of its discretionary exercise, they submitted it was not a case to interfere with the discretion already exercised by both Courts in *India*. The defence shewed that the Appellant claimed an exclusive title; that he had set up a nuncupative will in his favour, and had persisted in it down to the latest stage of the litigation; that he had delayed and prevented the completion of the wajibulurz. By the latter act he had obstructed the full right and enjoyment of her property by the widow, and had practically destroyed its saleable value. They referred to *Sadut Ali Khan* v. *Abdool Gunny* (6), and *Story's* Equity Jurisprudence, par. 711 (a). It was more than a mere assertion, as in the *Rajah of Pachete's Case* (2). Here,

(1) 11 Beng. L. R. 171, 187.
(2) Law Rep. 2 Ind. Ap. 83.
(3) Ibid. 169.
(4) 10 Moore's Ind. Ap. Ca. 359.
(5) 12 Moore's Ind. Ap. Ca. 157.
(6) 11 Beng. L. R. 203, 226.

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on the Defendant's objection, the Settlement Officer refused to make out the wajibulurz in the manner in which the plaintiff was entitled to have it made out, and instead thereof he made, at the Defendant's instance, an entry requiring legal steps to clear up a matter of title and present right. Moreover, the petition on which special leave to appeal had been obtained, had referred only to questions of great public importance being involved, and it does not appear that any leave was granted to appeal on the ground now taken, or that leave would have been granted at all for the purpose of taking it, and thereby excluding the decision of the important questions involved. *Uberrima fides* is required on the part of those who apply for special leave to appeal: see *Ramsabuk Bosa* v. *Monmohinee Dossee and Others* (1). And it is not competent to a suitor to obtain leave to appeal for a specified purpose and defeat that purpose by insisting on objections which were concealed at the time of the application.

Doyne, replied.

THEIR LORDSHIPS reserved their decision upon this preliminary point, and directed that the argument should be proceeded with on the merits.

Doyne, and *Raikes*, for the Appellant.

Cowie, Q.C., and *Cowell*, for the Respondents.

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the High Court of the North-west Provinces, which substantially affirmed a decree of the subordinate Judge of *Meerut*.

The suit was originally brought by the Respondent, *Mussumut Dakho*, the sonless widow of *Ishq Lall*, in her own name; *Moorari Lall*, her daughter's son, whom she had adopted, being afterwards added as co-Plaintiff. The Defendant (the Appellant) was a younger brother of *Ishq Lall*.

The family were Saraogee-Agarwalas, one of the divisions of the

(1) Law Rep. 2 Ind. Ap. 71.

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sect of Jains, whose laws and customs with regard to a widow's estate and her power of adoption differ, as the Respondents allege, from the ordinary law by which Hindus are governed. This difference gives rise to the principal questions to be decided in the present suit.

Ishq Lall died in 1867. He left considerable property, including government notes to the value of upwards of five lakhs of rupees. The widow took out the certificate of administration of his estate, and obtained possession of it.

It is admitted that the adoption by the *Mussumut* of her grandson was made without any authority expressly derived from her deceased husband, and without the consent of his kindred—an adoption therefore, which on that ground, as well as by reason of the relationship of the parties, would be invalid by ordinary Hindu law.

The immediate occasion of the suit arose in the following manner:—*Ishq Lall*, who had been an army contractor, received from the Government as a reward for services rendered during the mutiny a grant for his life of the zemindary of mouzah *Nabali*, in pergunnah *Baghpat*, an estate to which Government had acquired title by forfeiture. After his death the Government offered to sell the mouzah to his widow, and she purchased it at the price of Rs.6,206. It has been assumed that the purchase-money was paid out of the proceeds of her deceased husband's estate. It appears that whilst making up the wajibulurz (a document called by the subordinate Judge "the village administration paper"), the Settlement Officer called upon the widow to name her successor to the mouzah, with a view to enter the name in this paper; and that in answer to this requisition she requested that the name of *Moorari Lall* should be recorded as her adopted son and successor. The Appellant objected to this being done, and the Settlement Officer thereupon ordered the following special entry to be made in the wajibulurz:—

"Para. IX. Regarding special tribes and customs of adoption, second marriage, or succession.

"*Mussumut Dakho* desired that *Moorari Lall*, her daughter's son, whom she adopted, should succeed her after her death. But *Sheo Singh Rai*, the younger brother of her husband, on hearing this,

objected that it is illegal that an adoption should take place without the permission of the husband's near relations. The Settlement Officer therefore passed the following Order on the 15th of July, 1871: 'The parties may get this point decided by the Civil Court, and all points of this paragraph shall be decided by order of the Civil Court.'"

Both the Courts in *India* have stated that the Settlement Officer, in calling upon the Mussumut to name her successor, acted in excess of his powers. It has not been shewn what is the precise object of the wajibulurz, nor what are the regulations or orders under which it is made. The reference to "Paragraph IX, Regarding special tribes and customs of adoption, second marriage, or succession," seems to indicate that when these special customs are found to exist, it is desired that they should be recorded for the information of the Settlement authorities. The Settlement Officer directed that the order he had made for the above entry should be communicated to the Mussumut by the Tahsildar, and that she should be advised to have the question settled by the Civil Court.

The present suit was thereupon brought; and, in consequence of an objection which has been taken to its maintenance, as being a declaratory suit only, it will be necessary to advert to the proceedings in it.

The plaint (the widow being sole Plaintiff) asserts in a general and somewhat informal manner her claim to be maintained in possession "by establishment of Plaintiff's exclusive right of inheritance to the estate of her husband, composed of the mouzah above described, and to uphold the adoption of *Moorari Lall*, Plaintiff's daughter's son, as well as his right permanently to succeed her after her death, by voiding the Defendant's pretensions, under the usages and customs of the Sarogi religion." It then alleges that the Defendant during the progress of the late settlement, raised the objection that the widow cannot, unless with the consent of the relations of the family, make an adoption, and that the Plaintiff was referred to the Court by the Settlement Department.

The Defendant, in his written statement, after objection to the

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suit on the grounds that the adopted son was not made a party to it, that the entry in the wajibulurz did not give a cause of action, and that the suit was unnecessary and premature, stated his defence on the merits as follows:—

"3rd. The law of inheritance applicable to the Jains is nothing different from the Shastras. They are all subject to the common Hindu law. Therefore, both according to law and custom, the adoption of a daughter's son is invalid; moreover, the custom of adoption is not universally recognised among the people of this sect.

"4th. Among the Jains, a widow is not competent of herself to adopt a son, unless with the permission of her husband or the consent of the near heirs.

"5th. The Plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The Defendant, the brother of the deceased, is, under the Shastras as well as a verbal declaration of *Ishq Lall*, the owner and possessor of the whole of his estate. The Plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as she lives, and then the Defendant will be entitled to it as reversioner."

Evidence having been taken respecting the customs and tenets of the Saraogee-Agarwalas Jains, the subordinate Judge, without specifically deciding upon these customs, dismissed the suit on the ground that the Plaintiff, by adopting a son who, upon adoption, would become, if his adoption were valid, heir to his father, "had raised a barrier" to her own claim of absolute right. Upon appeal to the High Court, the Judges were of opinion that the subordinate Judge had not sufficiently inquired into and ascertained the special customs of the Jains, and that he was wrong in dismissing the suit. The Court, therefore, remanded the suit under sect. 351, *Civil Procedure Code*, and directed that an opportunity should be given for making the adopted son a party to the suit.

The following passage of the judgment contains the view of the Court with regard to the nature and scope of the inquiry to be made by the subordinate Judge:—

"We are invited by the pleaders of the parties in this Court to

give directions to the Court below on the questions of Jain law which are raised in this suit.

"The Jains have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them; and for the ascertainment of those customs we think the Court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the Jain community in the places in which they are said to be numerous and respectable, viz., *Delhi*, *Muttra*, and *Benares*. The questions to be addressed to these gentlemen would be the following:—

"'What interest does the widow take under Jain law in the moveable and immoveable property of her deceased husband? and does her interest differ in respect of the self-acquired property and the ancestral property of her husband? Is a widow under Jain law entitled to adopt a son without having received authority from her husband, and without the consent of her husband's brother? May a widow adopt the son of her daughter? By the adoption of a son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband?

"'Has the adoption of a son by a widow any effect, and (if any) what effect in limiting the interest which she takes in her husband's estate? And if the subordinate Judge considers that the verbal gift which the Respondent alleges is established by proof, he might further inquire whether such a gift is valid as against the widow?'"

Upon the suit being thus remanded, *Moorari Lall*, the adopted son, was made a co-Plaintiff, the Mussumut being appointed his guardian.

Commissions to take evidence as to the customs of the Saraogee-Agarwala Jains were then issued to *Delhi*, *Jeypore*, *Muttra*, and *Benares*, and several leading members of that division of the Jain community were examined under them at each of these places. The subordinate Judge has thus summarised their evidence:—

"With the exception of one from *Delhi*, the others unanimously declare that, in the absence of any son, a Jain widow succeeds to

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the estate of her husband, moveable and immoveable, in absolute right. 2nd. That she can deal with it at pleasure and without restriction. 3rd. That she can adopt her daughter's son, without requiring any consent or authority from her deceased husband, or relatives of such deceased husband; and that such adopted son would succeed to her deceased husband's estate in the same manner as her own begotten son would have done, with a slight restriction. 3rd. That a nuncupative will by her husband would not be valid as against her; but this last point does not at all bear on the case, seeing that there is no evidence as to any such will having been pronounced."

The subordinate Judge then made a decree in favour of the Plaintiff in the following terms:—

"That the Plaintiff is entitled to a decree to be maintained in possession of the zemindary property in question, on the ground of her exclusive and absolute right thereto as heir of her husband, and for a declaration of the validity of the adoption made by her, and of the right of her adopted grandson by her daughter, there being nothing to prevent his succession to the estate."

The Defendant again appealed to the High Court, one of his grounds of appeal being that the witnesses, except at *Jeypore*, had not been examined on oath. Another ground was, "That the finding of the Subordinate Judge as to there being no evidence regarding the nuncupative will by the deceased husband of the Plaintiff in favour of the Appellant was incorrect."

On this appeal coming on to be heard, the Judges of the High Court held that the evidence objected to had been irregularly taken, and being of opinion that it would not be proper to decide the important questions of Jain law involved in the case upon the evidence of the *Jeypore* witnesses alone, they determined, before finally disposing of the appeal, to issue fresh commissions from their own Court to *Delhi*, *Muttra*, and *Benares*. These commissions were accordingly issued, and under them the original and new witnesses were examined, whose testimony was given at greater length than on the first occasion.

Upon the return of these commissions, the cause was finally heard by the High Court, and the judgment now under appeal

pronounced. It contains the following general account of the history and religious tenets of the Jains:—

"The parties are Saraogee-Agarwalas, one of the numerous sub-divisions of the sect of the Jains. What little is known of the history of that sect is to be found collected in the learned judgment of the Chief Justice of *Bombay* in *Bhagvandas Tejmal* v. *Rajmal* (1). For upwards of eleven and twelve centuries they have seceded from the creed of the Vedas, and their religious tenets have more affinity with the precepts of the Buddhists than with those of the Brahmins. They recognise the caste system of the Brahminical Hindus, and in such ceremonies as they retain, generally avail themselves of the assistance of a Brahmin.

"They differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and, consequently, adoption is a merely temporal arrangement and has no spiritual object."

The Judges then proceed to an elaborate review of the decisions in *India* in which the laws and customs of the Jains have been considered. It appears to have been contended before them, to use the words of the Court, "that the applicability to Jains of the laws of the Brahminical Hindus, or what is generally termed Hindu law, had been established by so many rulings that the Court was bound to apply it to this case;" and further, that no uniform and consistent body of customs and usages existed among the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that where these were satisfactorily

(1) 10 Bomb. H. C. R. 241.

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proved, effect ought to be given to them. The learned counsel for the Appellant, who argued the case at their Lordships' Bar, felt himself unable to dispute the correctness of this conclusion.

It would certainly have been remarkable if it had appeared that in *India*, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindu or Mahomedan, the Courts had denied to the large and wealthy communities existing among the Jains, the privilege of being governed by their own peculiar laws and customs, when those laws and customs were, by sufficient evidence, capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise.

It no doubt appears from the judgment of the High Court of *Bombay* delivered by Chief Justice *Westropp*, in *Bhagvandas Tejmal* v. *Rajmal* (1) that the Judges of that Court were not satisfied that in the Presidency of *Bombay* usages had been established to exist among the Jains at variance with ordinary Hindu law. "Hitherto," they say, "so far as we can discover, none but ordinary Hindu law has been ever administered either in this Island, or in this Presidency, to persons of the Jaina sect." This view was expressed by the Judges after considering and commenting upon several extracts from historical and text writers. Thay also remark upon the impolicy of introducing departures from the general law. Their Lordships, however, do not understand the Judges to say that customs having such an effect may not lawfully be given effect to, if established by sufficient evidence On the contrary, their judgment contains this passage:

"But when amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

Reference was also made to the observations of this Board respecting the proof required to establish customs in the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal* (2).

(1) 10 Bomb. H. C. R. 241. (2) 14 Moore's Ind. Ap. Ca. 585.

The facts in the case before the High Court of *Bombay* were, that after the death of both husband and wife, the brothers of the deceased husband, with the consent of the punch, chose a nephew of the husband, to be his son by adoption. The evidence given in support of such a custom of adoption was slight, and the Court held that it was not sufficiently proved. It is said in the judgment, "not a single yati, or pundit, or priest, or other expert, either in the lore of the Jainas or of the Brahmins, has been called to prove the alleged custom." Undoubtedly such a custom being, as the Judges point out, opposed to the spirit of the Hindu law of adoption, would require strong evidence for its support, and such evidence appears to have been wholly wanting in that case.

In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit.

This evidence, particularly that taken at *Delhi*, is entitled to great weight, having regard both to the *status* of the witnesses, and to the consistent manner in which they describe the custom. It is stated in the judgment below that "*Delhi* is the chief seat of the Jains in the North-west of *India*, and is the adjoining district to that in which the property is situate."

The manner in which the witnesses were called together to be examined, and their position in the Jain community, are thus described in the judgment:—

"The Commissioner reports that on receipt of the Court's commission, he called upon the Deputy Commissioner to furnish him with a list of the names of the principal members of the Jain community residing in *Delhi;* that out of 125 persons whose names were so furnished, he selected 26 persons, whom he summoned to attend his Court, and that of the 26 he examined 6, of whom 2, *Zora Mul* and *Ghyan Chund*, were elders of the council of the sect at *Delhi*, appointed to determine all questions of religious and social importance arising in the sect, while the other 4 persons selected were all of a rank that entitled them to admission to the Lieutenant-Governor's Durbar. Of these also, one *Buldeo Singh* deposed he was a member of the council before-mentioned. Furthermore, the Commissioner, at the instance of the Appellant, took the evidence of 2 others out of the 26 persons summoned.

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As all the witnesses so selected by the Commissioner must be presumed to have been impartial, and as either party was at liberty by the terms of the commission to produce any witnesses he desired should be examined, and the Appellant availed himself of this privilege only so far as to examine two of the witnesses summoned by the Commissioner, it is hardly going too far to say that no better parol evidence could be obtained than was taken under the *Delhi* commission."

Their Lordships are relieved from an examination of this evidence in detail, since the learned counsel for the Appellant felt constrained to admit that the conclusions drawn from it by the Court were in the main correct.

These findings are thus stated in the judgment, and their Lordships entirely concur in them:—

"Contrasting this evidence with that given by the independent witnesses examined under the several commissions, and having regard to the position which several of the *Delhi* witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favour of the Respondents. It appears to us, that so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a Saraogee-Agarwalas takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus; that she takes an absolute interest, at least in the self-acquired property of her husband (and, as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband); that she enjoys the right of adoption without the permission of her husband or the consent of his heirs; that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the more reliable evidence, that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family."

The Court adds:—

"We do not, however, desire to be understood as ruling this point in this suit for the widow, and the adopted son has not been separately represented at the Bar, and we have not had the benefit of such assistance from the Bar on this point as on the other issues, there being at present no contest between the widow and the adopted son as to their respective rights. We shall affirm the decree of the subordinate Judge, declaring the validity of adoption and the right of the adopted son to succeed to the estate in suit as a begotten son, but we shall vary the decree of the subordinate Judge so far as it declares the widow entitled to be maintained in possession as proprietor, by inserting the alternative, or as manager on behalf of her adopted son."

Their Lordships will advert hereafter to the form of the decree.

They will now proceed to consider the objections raised to the suit on the ground that it is merely declaratory, and can lead to no relief.

It is scarcely necessary to say that their Lordships desire to adhere to the opinion declared in several decisions of this Board, that sect. 15 of the Indian Act VIII. of 1859 relating to declaratory decrees ought to receive the same construction as sect. 50 of the English Act, 15 & 16 Vict. c. 86, which is similarly worded, has received from the English Courts. In the last of these decisions the English and Indian cases on the subject were reviewed, and it was laid down that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court. (*Kathama Natchiar and Others* v. *Dorasinga Tever* (1)).

The question whether a right to some consequential relief exists must therefore arise in all suits in which a declaration of title is sought. It is enough for the present purpose to observe that a right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside,

(1) Law Rep. 2 Ind. Ap. 169.

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or for an injunction against such obstructions, would be sufficient to sustain a declaratory decree.

It was contended on behalf of the Respondents that the intervention of the Appellant in the proceedings of the settlement officer, and his objection to the entry on the wajibulurz of the name of *Moorari Lall*, as the adopted son of the Mussumut on the ground that the adoption was illegal, was an act of obstruction against which they were entitled to relief; and if it had been shewn that the entry thus objected to had been necessary to the settlement of the mouzah, or the completion of the title, or the right to present possession, the contention might have been well founded. But this has not been shewn. It would seem that the mouzah had been already granted by the Government to the Mussumut, and she had been recorded as proprietor. The object of the paper appears to be, as already stated, to record peculiar customs and rights for the information of the Settlement Officers; and although the Deputy Collector asked for information as to the Mussumut's successor, and upon the Appellants' objection to the entry of the adoption, placed his objection upon the wajibulurz, and referred the parties to a Civil Court, their Lordships would have felt great difficulty, to say the least, if it had been necessary to give a decision upon this point, in coming to the conclusion that these proceedings were such an obstruction to the title or right of possession as would sustain the decree.

Another ground on which it was alleged the Plaintiffs were entitled to relief was that the Appellant had put forward a nuncupative will of his deceased brother by which he was made the proprietor of the estate, and that the Plaintiffs were entitled, if they had asked for it, to a decree annulling that will.

It would not probably be disputed that if a fictitious will in writing be set up, the heir, upon a proper case being made, might claim to have the document cancelled, and their Lordships are not prepared to say that in cases where property may legally pass by an oral will an analogous right to have it declared null may not exist. A claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. The reasons, too, for giving such relief

in the case of written wills would seem to apply to nuncupative wills, and one of them, the probable deaths of witnesses, with even greater force to the latter than the former.

It was, however, contended, on behalf of the Appellant, that relief against this will was not one of the objects of the original suit, which was confined to the intervention of the Appellant in the settlement proceedings. Undoubtedly the plaint refers only to this intervention, and the assertion of this will appears for the first time in the Defendant's answer. But it will be found, on reference to the proceedings, that the claim was persisted in after *Moorari Lall* had been added as a co-Plaintiff, and indeed to the end of the suit. One issue framed at the first hearing of the cause was whether the verbal will had been in fact made, and one of the questions put to the witnesses examined upon the customs of the Jains was, whether a verbal gift is valid against the widow. The commissions in which this question appeared were issued after the first remand to the subordinate Judge, and after *Moorari Lall* had been made a co-Plaintiff. In his judgment, given after the return of these commissions, the subordinate Judge expressly finds on this issue that a nuncupative will by the deceased husband would not be valid as against the widow; and although he adds that there was no evidence that such will had been "pronounced," the Defendant, in one of his grounds of appeal to the High Court, complains that this finding is not correct, and the High Court deals with the question of this will in its final judgment.

The contention, then, on the part of the Appellant that his putting forward of this will ought not to be regarded, is reduced to the objection that it was not introduced into the original plaint. It is, however, questionable whether, when *Moorari Lall* was made a Plaintiff, the suit ought not to be considered for this purpose as a new suit, and whether the Appellant, having before that time put forward the claim in question and persisted in it to the end, relief might not, if asked for, have been granted against it. It would not be necessary that the suit should have been in fact remodelled when *Moorari Lall* became Plaintiff, so as to ask for this relief, it is sufficient if it might have been so remodelled, and relief obtained.

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Their Lordships, however, do not think it necessary to give a definitive judgment on this question, because they are of opinion that under the circumstances in which this appeal to Her Majesty comes on to be heard, the Appellant ought to be precluded from insisting on his objection to the decree on the ground of its being declaratory only.

In his petition to the High Court for leave to appeal to Her Majesty, the Appellant made no reference in the grounds of appeal to this objection to the decree. The leave granted by the High Court having become abortive, in consequence of the deposit for costs not having been made in due time, application to this Board for special leave to appeal was made. In the petition for this leave, again no reference was made to this objection, but the application was based on the ground that important questions affecting a large community were involved in the decision sought to be appealed from.

This petition, after fully stating the conclusions of the High Court upon the evidence relating to Jain customs, contains the following passage:—"The Petitioner now humbly submits that the suit is one concerning properties of large value, and involving questions of great importance to the sect of the Jain community, to which the Petitioner belongs." Their Lordships having, on this ground, advised Her Majesty to grant special leave to appeal, they are invited, when the appeal comes on to be heard, not to examine or consider the important questions thus indicated, but to reverse the judgment on a ground which altogether excludes their discussion. Their Lordships do not by any means intend to lay down, as a rule, that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal; but, in the present case, considering the whole course of the proceedings in the Court below, to which they have fully adverted, the importance of the questions upon which the Appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, they think the Appellant ought not, at this stage, to be allowed to insist that by reason of these objections the decree appealed from should be reversed.

Exception has been taken to that part of the decree of the High Court which varied the decree of the subordinate Judge, declaring that the widow was entitled to be maintained in possession as proprietor, by substituting the declaration that the widow is entitled to retain possession of the estate, either as proprietor or as manager thereof on behalf of her adopted son, *Moorari Lall.* The substituted declaration, being in the alternative, is no doubt in one sense uncertain; but it is independent of the other declarations which decide the rights of the parties as between the Plaintiffs on the one side, and the Defendant on the other, and repel the Defendant's pretensions. The Court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being Plaintiffs. It is, no doubt, on this account that the decree, whilst it declares the right of the widow to present possession as against the Defendant, is framed in a form which avoids prejudice to the rights of the Plaintiffs *inter se.*

In the result, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court with costs.

Solicitors for the Appellant: *Oehme & Summerhays.*
Solicitors for the Respondents: *Watkins & Lattey.*

J. C.* 1878 March 14; April 13.

DORAB ALLY KHAN . . . . . PLAINTIFF;

AND

ABDOOL AZEEZ AND ANOTHER, EXECUTORS OF KHAJAH MOHEEOODDEEN, DECEASED } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Sheriff's Sale—Lands seized and sold out of the Jurisdiction—Rights of Purchaser.

Quære, can a purchaser at a sheriff's sale under a writ of *fi. fa.*, upon being evicted by the execution debtor, recover the purchase-money from the execution creditor, when the sheriff was without authority to execute the writ at the place where the property was situate, but did so under the authority and by the express direction of the judgment creditor:—

Held, that such a case must be distinguished from a sale by private contract, and being that of a sale *in invitum*, must be governed by rules peculiar to sheriffs' sales:

Held, further, that in such case the sheriff undertakes by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction, and that the execution creditor must be treated as a principal in the transaction.

Case remanded to be tried whether, on the facts to be proved, a cause of action having been shewn by the plaint, the evicted purchaser was entitled to recover back the purchase-money as money had and received to his use as upon a total failure of consideration, or to any other and what relief.

APPEAL from an order of the High Court (Aug. 23, 1875) confirming an order of Mr. Justice *Phear* (April 22, 1875) sitting as a Court of first instance, in the ordinary original civil jurisdiction of the High Court; by which order the suit instituted by the Appellant, as representative in estate of one *Dianut-ut-Dowlah*, deceased, was directed to be dismissed with costs.

The facts and the pleadings are sufficiently stated in the judgment of their Lordships.

That the sheriff hereafter mentioned was the agent of *Khajah Moheeooddeen*, the execution creditor, appeared from the 8th paragraph of the Plaintiff's written statement, and the letter therein contained, which were as follows:—

"8th. That, before the execution of the said writ of *fieri facias*,

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Mr. *Nicholas Paliologus*, the attorney of the said *Khaja Moheeoodeen*, wrote and sent to the then Sheriff of *Calcutta* the letter following:—

"*Kajah Moheeooddeen* v. *Hossen Ally Khan and Others.*

"To the Sheriff.

"Sir,—Please to seize such properties of the Defendant which will be pointed out to you by the Plaintiff, and which are in the actual possession of the Defendants or some of them.

"Yours obediently,

"30th June, 1866. *N. Paliologus*, Plaintiff's Attorney."

The judgment of the High Court (*Garth*, C.J., and *Markby*, J.) was as follows:—

"The learned Judge in the Court below considered, in the first place, that there is nothing on the face of the plaint to shew that the proceedings of the sheriff and also of the execution creditor, the present Defendant, were not perfectly *bonâ fide*, and in this we entirely agree. Whatever illegality or irregularity took place appears to have been the result of mistake, and there is nothing to shew that any of the parties had the least notion that they were doing anything but what the law warranted.

"It is stated, however, distinctly in the plaint, and we must assume it as established, that the sheriff has no right to execute the writ upon property in *Oudh;* and we will also assume, though it is not so clearly stated in the plaint as it might be, that the result of the proceedings before the Commissioner was that the sale of the sheriff was declared to be null and void, and that the Plaintiff's testator was thereupon removed and evicted from the property.

"The question then arises, can the purchaser at a sale by the sheriff under a writ of *fi. fa.* upon being evicted from the property purchased by the execution debtor recover the purchase-money which he has paid from the execution creditor, if it should turn out that the sheriff had no authority to execute the writ at the place where the property was situate?

"We are asked by the Appellant to consider and decide the case upon the assumption that the sheriff in seizing, selling, and conveying the property was the agent of the execution creditor;

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that the execution creditor was in fact the vendor, and as he had no right whatever to deal with or sell the property, there was a total failure of consideration, and that consequently the money paid to him for the purchase became money had and received to the use of the Plaintiff's testator.

"The case which appeared to be most strongly relied on in support of this view was *Johnson* v. *Johnson* (1), but that case is very plainly distinguishable. There a house was sold for £300, and the purchase-money was paid, but before the conveyance was executed the purchaser was evicted for want of title in the sellers, and under those circumstances the purchaser was allowed to recover at law the £300 from the vendor as money had and received to his use. But that was upon the express ground that no conveyance had been executed, and that has always been considered the true ground upon which the case was decided.

"But where the conveyance has been actually executed and the purchaser is evicted by a title to which the covenants in his purchase-deed do not extend, it is clear from the authorities that he cannot recover the purchase-money either at law or in equity (see *Sugden's* Vendors and Purchasers, 549, 14th edition, where most of the authorities are collected, and the case of *Clare* v. *Lamb*, in the Common Pleas (2), is to the same effect).

"The principle of these cases is directly applicable to the present. The purchaser has the means of inquiring into his vendor's title. He is bound to satisfy himself of the goodness of the title which he buys, and to protect himself by proper covenants; and we know of no authority for saying that a purchaser at a sheriff's sale, who expressly buys only the title and interest that the sheriff has to sell him, is in a better position than any other purchaser. If he chooses to buy imprudently, he must take the consequences of his imprudence.

"But apart from this consideration, which of itself affords in our opinion a complete answer to the Plaintiff's claim, there are other objections which present additional difficulties in the way of the Plaintiff's succeeding in this suit.

"In the first place, we cannot discover that there was any privity

(1) 3 B. & P. 162. (2) Law Rep. 10 C. P. 334.

of contract between the Plaintiff and Defendant which would justify the former in treating the latter as the party who had sold him the property.

"The fact of the Defendant and his attorney having directed the sheriff to seize this property might have made the Defendant answerable in tort to the judgment debtors for the act of seizure. But it does not follow from this that the sheriff was the Defendant's agent to sell this property, and still less, the Defendant's agent for the purpose of making a contract and executing a conveyance to any person who might become the purchaser at the sale.

"Then again there is the further difficulty, that having regard to the fact of the Plaintiff's testator's long continuance in the possession of this property, and in receipt of the rents and profits, it is impossible that under any circumstances the Plaintiff could sustain a claim against the Defendant in the shape which this plaint assumes, viz., a claim for money had and received, upon the ground that the consideration has wholly failed. The only conceivable form in which a suit could be maintained under such circumstances would be by a proceeding in the nature of a bill in Equity to set aside the sale and conveyance, and praying that an account might be taken in which the receipts and profits realized by the Plaintiff's testator on the one hand, would be set off against the amount of purchase-money, and the outgoings of the property on the other.

"For these reasons we consider that upon the Plaintiff's own statement he has failed to make out any ground of claim, either legal or equitable, as against the Defendant.

"The appeal must therefore be dismissed with costs on scale 2."

Leith, Q.C., and *C. W. Arathoon*, for the Appellant, referred to the *Indian Sheriffs Acts* (V. and VI.) of 1855, and contended that both the Respondent and the sheriff must have been aware of the fact that *Oudh* was not included in *Bengal, Behar*, or *Orissa*, mentioned in the writ of *fi. fa.*, and was not subject to the Presidency of *Fort William* in *Bengal*. A sale by the sheriff under such circumstances as are disclosed in this case of land pointed out by the execution creditor was equivalent to a sale thereof by the execu-

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tion creditor himself: see *Johnson* v. *Johnson* (1). [SIR JAMES W. COLVILE:—That case has nothing to do with execution.] See *Hitchcock* v. *Giddings* (2); where the Court interfered to rescind a contract on the equity that the vendor had no interest in the subject-matter at the time of sale. [SIR BARNES PEACOCK:—There the price had not been paid. SIR MONTAGUE E. SMITH:—Here the whole thing must be taken on this plaint to have been done under a mistake. The sheriff had no power to act, and all parties were under the belief that he had. SIR BARNES PEACOCK:—Does not the maxim *caveat emptor* apply? Should not the purchaser have looked at the writ, when he would have seen that the sheriff could not sell. If he had done so and objected, then a copy of the writ might have been sent to the Commissioner of *Oudh*, and the sale regularly effected.] No opportunity was given to the purchaser to obtain any guarantee of title. [SIR ROBERT P. COLLIER referred to *Sugden's* Vendors and Purchasers, 14th ed. p. 549.] The sheriff impliedly guaranteed his jurisdiction, and if the money had remained with him the purchaser might have sued him. Lands which were not covered by the writ were seized and sold by the officer of Court, and the purchaser was entitled to presume that the seizure and sale were regularly effected, whatever might be the right, title, and interest of the execution debtor.

Cowie, Q.C. (*Doyne* and *Graham* with him), for the Respondent, contended that no cause of action had been disclosed in the Courts below. Assuming that the sheriff acted as agent of the execution creditor; at the very highest, it is only as if the execution creditor had himself sold. He does not sell what he has no title to, nor does the sheriff act so utterly without jurisdiction as to become a trespasser. It is admitted that this was in fact the property of the judgment debtor, and that the sheriff, professing to act under the writ, seized this property. In what sense was that a mistake? *Hitchcock* v. *Giddings* (2) was not really a case of fraud, but a case of mistake of fact, the vendor having no interest in the property sold. This case is distinguishable from that. [SIR JAMES W. COLVILE:—How could the sheriff enforce his jurisdiction out of *Bengal?*] There was no question of enforcing the jurisdiction; the Plaintiff

(1) 3 B. & P. 162. (2) 4 Price, 135.

voluntarily submitted himself to it. On the bill of sale, independent of the writ, he had full notice that the property was out of the jurisdiction; but he nevertheless bought and voluntarily paid the price. There was no warranty of title, or even that the proceedings were regular. [SIR MONTAGUE E. SMITH :—The argument as to warranty goes on the English rules as to real property. In *India* there is no distinction between real and personal property. But in *England* the English rule as to a chattel is different from that as to real property.] There was here no mistake of fact; if there were any mistake at all, it was one of law. There is no averment in the plaint that there was any mistake either of fact or law. The Plaintiff has been in possession for two years, and at any rate the case would have to be remanded for an investigation into all the circumstances.

Leith, Q.C., replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

This is an appeal against a decree of the High Court of *Calcutta*, sitting as a Court of Appeal, which, on the 23rd of August, 1875, affirmed the judgment of Mr. Justice *Phear*, who, in the exercise of the original civil jurisdiction of the same Court, had, on the 22nd of April, 1875, dismissed the Appellant's suit with costs.

The suit was instituted in December, 1872, by the Appellant suing as executor of one *Dianut-ut-Dowlah* against *Khajah Moheeooddeen*, who died after leave to appeal had been given in *India*, and is represented by the present Respondents. The case was tried in *India* upon only the first and preliminary issue, viz., whether or not a good cause of action was disclosed in the plaint. It is, however, conceded that the statements in the plaint may be taken to be supplemented by, and to include any fact stated, or to be inferred by necessary implication from the written statement of the Plaintiff, or the documents annexed to and filed with either that or the plaint itself. These are the sheriff's bill of sale of the 9th of October, 1866; a petition of *Dianut-ut-Dowlah* to the Judicial Commissioner of *Oudh* and the order thereon; the will of *Dianut-ut-Dowlah* and the certificate granted to the Plaintiff as

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the executor named therein; the writ of *fi. fa.*, dated the 18th of June, 1866; and the warrant of attorney to confess judgment in the action in which that writ was issued. For the trial of the issue, which is in the nature of a trial on demurrer, the facts stated or to be implied as above mentioned must be taken to be true.

What, then, are those facts? Taken in chronological order, they are as follows:—In 1856, under the before-mentioned warrant of attorney, judgment was entered up in the late Supreme Court of Judicature at *Fort William*, at the suit of *Khajah Moheeooddeen* (the Defendant in this action), and one *Robert O'Dowda*, who was only joined with him as co-Plaintiff in order to give the Court jurisdiction, against *Wazeer Khan* and *Khajah Abdoos Samut*, for the purpose of securing the repayment of Company's Rs.70,000, with interest, on the 23rd of July, 1856. In order to enforce this judgment against *Khajah Abdoos Samut*, and the representatives of *Wazeer Khan*, who was then dead, a writ of *fi. fa.* was, on the 18th of June, 1866, directed to the sheriff of *Calcutta*, commanding him to cause "to be levied and made of the houses, lands, debts, and other effects, moveable and immoveable, of the said Defendants, within the provinces, districts, or countries of *Bengal*, *Behar*, and *Orissa*, or in the province or district of *Benares*, or in any other factories, districts, and places which then were annexed to and made subject to the Presidency of *Fort William* in *Bengal*, by seizure, and if necessary by sale thereof," a certain sum therein mentioned. The Plaintiff alleged that this writ did not legally authorize the levy of the sum in the writ mentioned by the seizure and sale of immoveable properties in *Oudh*, but that nevertheless the sheriff, "by the authority of *Khajah Moheeooddeen*, the execution creditor, and on the express instructions of his attorney, and professing to act under and by virtue of the said writ," on the 2nd and 20th days of August, 1866, seized the right, title, and interest of *Abdoos Samut* and of *Wazeer Khan*, then in the hands of his heirs and representatives, in a talook and premises within the province of *Oudh*, and put the property so seized up for sale on the 4th of October in the same year; that *Dianut-ut-Dowlah* became the purchaser of it for the sum of Rs.26,000; and that the sheriff afterwards executed to him the bill of sale of the 9th of October, 1866, which is annexed to the plaint. He further alleged

that before the execution of the bill of sale, *Dianut-ut-Dowlah* paid the purchase-money to the sheriff who, about the 12th of October, 1866, paid Rs.5000, part thereof, to the attorney of the Plaintiffs in the suit; and on the 25th of October, 1867, paid the balance of the purchase-money, less his poundage and charges, to *Moheeooddeen* himself; that the sheriff, by his officer, put *Dianut-ut-Dowlah* into possession of the property, but that such delivery of possession was not legal or operative by the law then in force in *Oudh*, and that by that law the sale was wholly inoperative, and did not pass the right, title, and interest of the judgment debtors or of any other person to *Dianut-ut-Dowlah*; that afterwards and under some proceedings which took place in the Courts in *Oudh* (the nature whereof, except that they began with a proceeding instituted by *Dianut-ut-Dowlah* himself for a partition, does not very clearly appear), the sale was pronounced null and void, and that thereupon and in the month of August, 1868, *Dianut-ut-Dowlah* was removed from possession of the talook and premises. The Plaintiff then admitted that *Dianut-ut-Dowlah*, whilst in possession, had made collections to the amount of Rs.10,937, but alleged that after payment of the Government revenue, collection and law charges, and other necessary outgoings, a balance of only Rs.446. 6*a*. 9*p*. remained in his hands, and that such balance was the only profit, benefit, or advantage which he obtained from the purchase, and then, after stating the death of *Dianut-ut-Dowlah* on the 23rd of June, 1868, the title of the Plaintiff as his executor, a demand by the Plaintiff and a refusal by the Defendant, the plaint goes on to say—"The Plaintiff sues the Defendant for the sum of Rs.26,000 for moneys had and received by the Defendant for the use of the said *Dianut-ut-Dowlah*."

Mr. Justice *Phear*, in the course of his judgment, made some attempt to support the regularity of the seizure and sale of the property under the writ of *fi. fa.* In their Lordships' opinion, the decree under appeal cannot be supported upon any such ground. The illegality of these proceedings is sufficiently alleged, and the objection to them is patent on the face of the plaint. The jurisdiction of the late Supreme Court, and of the sheriff as its officer, was originally limited by the Charter of Justice of 1774 to the provinces of *Bengal*, *Behar*, and *Orissa*, and though after-

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wards extended by the 39 & 40 Geo. 3, c. 79, s. 20, was so extended only to the province or district of *Benares*, and to and over all such provinces and districts as might at any time thereafter be annexed to and made subject to the Presidency of *Fort William*. The writ of *fi. fa.*, which was the sheriff's authority for the seizure, was carefully framed in accordance with this definition of his jurisdiction. If, therefore, he seized property in any place which did not form part of, and had not been annexed to, the Presidency of *Fort William*, he was as much a trespasser as an English sheriff who had seized property out of his bailiwick would be. That the province of *Oudh* was not, when first annexed to *British India*, or at the date of the execution, annexed to the Presidency of *Fort William*, if not one of those historical facts of which the Courts in *India* are bound, under the *Indian Evidence Act*, 1872, to take judicial notice, was at least an issue to be tried in the cause.

The question to be determined was, however, correctly stated in the judgment of the High Court on the appeal. After stating that they must assume it as established that the sheriff had no right to execute the writ upon property in *Oudh*, and also, though that was not so clearly stated in the plaint as it might be, that the result of the proceedings before the Commissioner of *Oudh* was that the sale was declared null and void, and that the Plaintiff's testator was thereupon evicted from the property; the learned Judges said: "The question then arises, can the purchaser, at a sale by the sheriff under a writ of *fi. fa.*, upon being evicted by the execution debtor, recover the purchase-money which he has paid from the execution creditor, if it should turn out that the sheriff had no authority to execute the writ at the place where the property was situate?" If that sentence had stood alone, their Lordships think it would have required to be modified by the addition of some such words as "and that he did so execute it under the authority, and by the express direction of the judgment creditor." They understand, however, that modification to be implied in the next sentence of the judgment, which is in these words:—"We are asked by the Appellant to consider and decide the case upon the assumption that the sheriff in seizing, selling, and conveying the property, was the agent of the execution creditor; that the execution creditor

was in fact the vendor; and as he had no right whatever to deal with or sell the property, there was a total failure of consideration, and that consequently the money paid to him for the purchase became money had and received to the use of the Plaintiff's testator." This assumption seems to be amply justified by the eighth paragraph of the Plaintiff's written statement, and the letter therein set forth (*vide supra*, p. 116). The question thus stated is novel, and not without difficulty.

Their Lordships propose to consider, first, whether in the circumstances stated the evicted purchaser can have any remedy against the execution creditor.

There is no doubt that the authorities cited in the judgment of the High Court, and relied upon at the Bar, establish the proposition which is thus stated by Lord *St. Leonards* at page 549 of the 14th edition of his work on Vendors and Purchasers: "If the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." This general rule seems by the law of *England* to govern all sales by private contract between the parties either of a freehold or of a leasehold interest in land.

Does it, however, govern a case like the present, in which the sale, as regards the owner of the thing sold, is *in invitum*, and made under colour of legal process? The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a sheriff's sale has at best very inadequate means of investigating the title of the judgment debtor; all that is sold and bought is the right, title, and interest of the judgment debtor with all its defects; and the sheriff who sells, and executes the bill of sale, is never called upon, and, if called upon, would refuse, to execute any covenant of title. Therefore, the reasons for the rule failing, the rule itself cannot properly be held applicable to sales by the sheriff, which are governed by rules peculiar to such sales.

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Now it is, of course, perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment debtor, he has no remedy against either the sheriff or the judgment creditor. This, however, is because the sheriff is authorized by the writ to seize the property of the execution debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

The sheriff, however, if he acts *ultrà vires*, cannot invoke the protection which the law gives to him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no title to sell. And it appears to their Lordships that his responsibility in respect of the sale must be governed by the law relating to the sale of chattels, rather than by that relating to the sale of real estate. There is not in *India* the difference between real and personal estate which obtains in *England;* and moveable and immoveable property are alike capable of being seized and sold under a writ of *fi. fa.*

The law of *England* as to implied warranty of title in chattels sold was until lately, if it is not still, in some uncertainty. The more modern cases are collected by Mr. *Benjamin* in his work on Sales, 2nd edition, page 511 *et seq.* In *Sims* v. *Marryat* (1), Lord *Campbell*, when commenting on Mr. Baron *Parke's* judgment in *Morley* v. *Attenborough* (2), after saying that the law was not in a satisfactory state, observed: "It may be that the learned Baron is correct in saying that on a sale of personal property the maxim of *caveat emptor* does by the law of *England* apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule."

One of the latest expositions of the law on this point is to be found in the case of *Eichholz* v. *Bannister* (3), which was decided in 1864. In that case Chief Justice *Erle* is reported to have said: "I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirms that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the

(1) 17 Q. B. (N.S.) 281.
(2) 3 Ex. 500.
(3) 34 L. J. (C.B.) 105; 17 C. B. (N.S.) 708.

contract, and if it turns out in fact that he is not the owner the consideration fails, and the money so paid by the purchaser can be recovered back." This passage, it is to be observed, although contained in the report in the *Law Journal*, is not to be found, *totidem verbis*, in the regular report. The actual decision, however, in which all the Judges concurred, was that on the sale of goods in an open shop or warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise the buyer may recover back the price as money paid as on a consideration that has failed.

A rule of this kind cannot, of course, be applied to a sale of goods by the sheriff under a *fi. fa.*, because what the sheriff professes to sell is only the right, title, and interest, whatever that may be, of the judgment debtor, and this was the express ground of the decision in *Chapman* v. *Speller* (1), where the case is treated as an exception to the general rule. It would seem, however, that, even according to the principles laid down in *Morley* v. *Attenborough* (2), which, of the modern cases, is the most favourable to the application of the maxim *caveat emptor*, the sheriff may reasonably be held to undertake by his conduct that he is acting within his jurisdiction. In that case, though it was decided that on the sale by a pawnbroker of an article pawned with him as an unredeemed pledge there is no implied warranty of the pawnor's title, the judgment of Mr. Baron *Parke* seems to assume that the pawnbroker does warrant that the article has been pledged with him, and has become irredeemable. The learned Judge says: "In our judgment it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it." So, too, it may be inferred from *Hall* v. *Conder* (3) that although upon the sale of a patent there is no implied warranty that the patent is valid and indefeasible, it would be reasonable to hold that there is an implied warranty that letters patent for the alleged invention have been regularly issued under the Great Seal. Their Lordships think that upon a similar principle the sheriff may be held to

(1) 14 Q. B. (N.S.) 621. (2) 3 Ex. 500.
(3) 2 C. B. (N.S.) 22.

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undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction; although when he has jurisdiction he does not in any way warrant that the judgment debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment debtor.

In the present case the subject matter of the sale was the estate of the execution debtor, so that if the sheriff had had jurisdiction his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative and wholly ineffectual. The High Courts have assumed that if the Defendant is to be treated as a principal in the transaction (and their Lordships think he ought to be so treated) the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales of immoveable property. This view does not appear to their Lordships to be correct. The Defendant directed the sheriff to sell in his character of sheriff. He did not profess to sell, nor could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the sheriff as sheriff, and with the incidents attaching to such a sale. For the above reasons their Lordships are of opinion that the action cannot be properly determined without further investigation into the facts, as they cannot say that the plaint and the other documents on the record do not disclose a *primâ facie* case for some relief against the Defendant.

There is, no doubt, a further question whether the Plaintiff has shewn a case which, if proved, would entitle him to recover back the purchase-money as money had and received to his use as upon a total failure of consideration. To that their Lordships think the admitted fact of the possession by his testator for nearly two years of the property in question, and his perception, partial at least, of the rents and profits, might be a fatal objection. It could not, in such case, be said that the consideration wholly failed. But it is not quite clear on the record that this objection arises, since if the sale has been treated as a nullity, the purchaser has been accountable, and may have accounted, for what he received; and in any case the Court in *India* will be competent to mould the relief according to the facts finally established at the

hearing. Their Lordships, of course, offer no opinion whether the Plaintiff will ultimately succeed in establishing his right to any relief. It may turn out that his testator, who never made any claim for a return of the purchase-money in his lifetime, bought with knowledge of the defect in the sheriff's jurisdiction, or has, by acquiescence or in some other way, forfeited any right which he might otherwise have had to relief. They only decide that the Plaintiff has not wholly failed to disclose a good cause of action on the face of the record; and that the cause ought to be tried on the other issues that have been, or may be, raised in it. And they will accordingly advise Her Majesty to reverse the two decrees of the High Court, and to remand the cause for trial upon any other issues settled or to be settled in the suit. They think that the costs of both parties to this appeal should be taxed, and a certificate of their amount sent to the High Court, in order that they may hereafter be dealt with by that Court as costs in the cause.

Agent for the Appellant: *T. L. Wilson.*
Agents for the Respondents: *Oehme & Summerhays.*

J. C.* 1878 April 5, 6, 9, 10, 11, 13.

BURMAH TRADING CORPORATION, LIMITED. . . . . } DEFENDANTS;

AND

MIRZA MAHOMED ALLY SHERAZEE AND THE BURMAH COMPANY, LIMITED. . } PLAINTIFFS.

AND CROSS APPEALS.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Measure of Damages—Liability of Master for the Wrongful Act of his Servant.

In estimating the damages for the conversion of Plaintiff's goods, the value of the goods at the place where the principal market for them exists, is the right basis of calculation; but there must be deducted from the price at which they could there have been sold, the cost of conveying them thereto.

Morgan v. *Powell* (1) approved.

In an action to recover damages from the Defendants for obstructing the Plaintiff's right of ingress and egress to a forest, and his right of obtaining and removing timber therefrom, *held*, on the evidence, that the obstruction was not caused by the persons who were agents of the Defendants for the purpose of working in the forest, or of doing any class of acts analogous to those complained of, and that the Defendants were not shewn to have knowingly adopted or ratified those acts, and that the acts were not shewn to have been committed for their benefit.

A principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, and for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit. Though the master may not have authorized the act, if he has put the agent in his place to do a particular class of acts, he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.

APPEALS from decrees of the Recorder of *Rangoon*, dated the 4th of November, 1876.

The facts of the cases appear in their Lordships' judgment.

Butt, Q.C., *W. G. Harrison*, Q.C., and *Doyne*, for the Appellants.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 3 Q. B. 278.

Benjamin, Q.C., *Cowie*, Q.C., and *John Elms*, for the Respondents.

April 13. The judgment of their Lordships was delivered by SIR ROBERT P. COLLIER :—

These are appeals and cross appeals from judgments of the Recorder of *Rangoon* in two suits, in which *Mirza Mahomed Ally*, together with a company called the *Burmah Company, Limited*, were Plaintiffs. The *Burmah Company*, being merely put upon the record as assignees of the Plaintiff's right of action, need not be further referred to. The Defendants in both cases were the *Bombay and Burmah Trading Corporation*. The first action was brought to recover damages for the conversion by the Defendants of a large quantity of logs of timber belonging to the Plaintiff, the second to recover damages for the obstruction by the Defendants of the Plaintiff in the exercise of his alleged right to remove timber from certain forests in *Burmah*. The Recorder gave judgment for the Plaintiff in both suits.

The case of the Plaintiff may be stated in outline thus. He was what may be called a middle man between the foresters in the woods of *Burmah* and the merchants of *Rangoon* who bought the timber felled. In the year 1867, he had a right, obtained from the Burmese Government, to fell or otherwise possess himself of timber in a certain forest known as the *Ningyan* forest belonging to the King of *Burmah*, and to take the timber by water to *Rangoon*. In that year two other persons, who may be also called middlemen, named *Darwood* and *Goldenberg*, had a concurrent right to obtain and export timber. In the summer of that year *Darwood* and *Goldenberg* succeeded in obtaining from the Burmese Government a monopoly of the right to export timber from the *Ningyan* forest, lasting for four years. The grant was dated on the 15th of July, 1867, but was not to come into operation until November of that year. In obtaining that grant *Darwood* and *Goldenberg* acted as agents of the Defendants. The Plaintiff's case is that between the date of the grant and the time when it came into operation, he was possessed of a large quantity of logs of timber, in all about five thousand, part of which he had felled,

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part of which he had bought, and that he would have been able to take these logs by water to *Rangoon* during that interval, in which it was permitted to him and other foresters to take away their timber, but that he was forcibly prevented from doing this by *Darwood*, who acted as an agent of the Defendants. He further goes on to shew that in the next year 1868, he actually found in the possession of the Defendants, at a place called *Tounghoo*, an intermediate station between the *Ningyan* forest and *Rangoon*, a large quantity of logs, 1241 in number, which belonged to him. They are alleged to have been discovered in the year 1868 in the possession, at *Tounghoo*, of a Mr. *Petley*, an agent of the Defendants. The Plaintiff brings his first action to recover damages for the conversion by the company of the logs found at *Tounghoo* in *Petley's* possession. He brings his second action to recover damages in respect of the injury he has sustained by being prevented by *Darwood* in August or September, 1865, from removing the remainder of the logs to which he was entitled. These logs, after deducting such as had by some means come into his possession, he alleges to be in number 1873.

Such is a short outline of the Plaintiff's case. Their Lordships do not propose to review the evidence in detail, a task which was very carefully and laboriously performed by the learned Recorder. They cannot help observing, however, with respect to the evidence in general, that it appears to them of a loose, confused, and enbrangled character, and that the Plaintiff cannot be regarded as a satisfactory witness, inasmuch as he has been convicted of perjury.

It now becomes necessary to deal with the two actions separately.

In the first action the Plaintiff, as before observed, claimed damages for the conversion of 1241 logs. The learned Judge has found that 1041 of his logs were converted by the Defendants, and has given as damages the full value of each of those logs at *Rangoon*, which he estimates at Rs.50. Undoubtedly, in this case there is evidence, which if believed would justify the learned Judge in his finding for the Plaintiff, that a large quantity of his logs was in the possession of the Defendants. The Plaintiff produces a list which is sworn by a person whom he employed to have been made out from memoranda taken from personal observation

of logs which he found in *Petley's* possession in 1868, bearing the Plaintiff's property marks, though not his delivery marks. The number of the logs in that list is 1187. There is some further evidence of the same kind respecting a lot of 11 logs. It is contended for the Respondents that this list is to a certain degree confirmed by another list which was put in and sworn to by another witness, of 981 logs, which are alleged to have been found in the same summer and autumn in the possession of *Darwood* in the creeks at *Ningyan*. There is also some evidence of *Darwood* having taken possession of about 1000 logs of timber in the forest. Their Lordships are not insensible to the weight of several observations which have been addressed to them by the counsel for the Appellants impugning the genuineness of these documents, and the general truthfulness of the Plaintiff's case, not the least weighty of which was that the Plaintiff brought actions in 1869 for some far smaller lots of timber which, according to his own shewing, came down the river to *Tounghoo* after the large lot for which he brought his present action in 1872, and that he appears to have demanded this lot for the first time shortly before he brought his action. But after giving due weight to this and other objections which have been made to the whole of the Plaintiff's case, their Lordships have come to the conclusion that whatever view they might have taken of the case had it come before them as a Court of first instance, it has not been sufficiently established that the learned Recorder, who considered the evidence with great care, was wrong in coming to the conclusion of fact that the Defendants had in their possession a large quantity of logs belonging to the Plaintiff.

Their Lordships, therefore, are not prepared to reverse his finding, that the Defendants had in 1868 a large quantity of logs of the Plaintiff's in their possession, nor are they satisfied that his computation of the number of those logs was wrong. But they are of opinion that he has somewhat erred in his estimation of the damages. He appears to have treated the case as what, in language familiar in *Westminster Hall* a few years ago, was called an action of detenue, in which the Plaintiff sought to recover a specific chattel which the Defendant detained from him, and in which the judgment was that the Defendant do deliver the chattel or pay the

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value of it. But this is neither in form nor in substance such an action, but more resembles what used to be called an action of trover. The subject-matter of the action is timber, an ordinary article of commerce, which, according to the evidence of the usage of trade is disposed of in the same year in which it arrives at *Rangoon*, either by sale or by being cut up, or in various ways. This the Plaintiff must have perfectly well known, and he could not, and indeed he does not profess, to claim four years afterwards the restitution of the particular logs which were found in 1868 at *Tounghoo*. His claim is to the damages which he has sustained by the conversion of the logs by the Defendants at *Tounghoo* at that date. It may be right indeed to take the value of the logs at *Rangoon*, where the principal if not the only market for them existed, as the basis of the calculation; but from the price at which the Plaintiff could have there sold them must be deducted what it would have cost him to bring them to the market. This principle of estimating the damages is in accordance with the case of *Morgan* v. *Powell* (1), and with other cases with which English lawyers are familiar. It has been found by the learned Judge upon the evidence that Rs.4 a log would be the cost of conveying logs from *Tounghoo* to *Rangoon*. There is no direct evidence of what the cost of conveying logs from *Ningyan* to *Tounghoo* would be; but the distance is said to be about three days' journey, and the price of logs at *Tounghoo* is more than double the price of logs in the forest, a difference which must in some degree be composed of the cost of conveyance.

On the whole their Lordships are of opinion that they will be doing no injustice to the Plaintiff if they assume the cost of conveying timber from *Ningyan* to *Tounghoo* to be as much as that of conveying it from *Tounghoo* to *Rangoon*. They think, therefore, that the sum of Rs.8 per log should be deducted from the selling price at *Rangoon*. As some evidence was given of the price which the Recorder adopts, viz., Rs.50 per log, they adopt his finding on this point. They are therefore of opinion that from the Rs.52,050 which have been given to the Plaintiff, Rs.8,328 should be deducted, leaving a balance of Rs.43,722.

The next action gives rise to different considerations. It was

(1) 3 Q. B. 278.

originally an action for conversion of logs, but the amended plaint alleges in substance that the Defendants obstructed the Plaintiff's right of ingress and egress to the forest, and his right of obtaining and removing timber therefrom, whereby he suffered the damage complained of. It is not necessary further to advert to a question of limitation which was disposed of during the argument; but a more formidable objection to the maintenance of the action has to be dealt with, viz., that the Defendants are not responsible for the wrongful acts of *Darwood* in August or September, 1867, assuming them to be proved; whether or not the Recorder was right in finding that they were proved it becomes immaterial to decide, in the view which their Lordships take of the case.

It was contended on behalf of the Respondents, that *Darwood* was the agent of the Defendants, and that the Defendants are responsible for those acts. That view was endeavoured to be supported by reference to the case of *Mackay* v. *The Commercial Bank of New Brunswick* (1), in which the rule was laid down as to the principles which regulate the liability of a master for the acts of an agent done without his express authority, but still within the scope of the authority of the agent. Some expressions of Mr. Justice *Willes*, in the case of *Barwick* v. *The English Joint Stock Bank* (2), referred to in the judgment of this board, were especially relied upon, and appear to contain as clear an exposition of the law upon this subject as is anywhere to be found. They are as follows:—"With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit;" and the learned Judge goes on further, with reference to what may be deemed the course of the service, to observe, "In all these cases, it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in

(1) Law Rep. 5 P. C. 394. (2) Law Rep. 2 Ex. 259.

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doing the business which it was the act of his master to place him in." It has been contended on the part of the Respondents, that although there is no evidence of the Defendants authorizing the particular acts of violent obstruction of *Darwood* complained of, still that, inasmuch as the Defendants put *Darwood* in a position to do that class of acts, and they were done for the Defendants' benefit, they are responsible for them, upon the principle laid down in the cases just referred to

It now becomes necessary to refer to what evidence there is of *Darwood's* authority. On the 28th of March, 1867, we have an agreement put in between *Darwood* and *Goldenburg* and the company Defendants, whereby *Darwood* and *Goldenberg* agree to sell to the company, and the company to purchase, the logs which *Darwood* and *Goldenberg* cut. That document establishes the relation of vendor and purchaser only, and not that of master and servant, or principal and agent. The next material fact is that on the 15th of July, 1867, *Darwood* obtained a grant of the monopoly for four years, in obtaining which he must be taken to have been the agent of the Defendants, but that monopoly was not to take effect until the November following. Then follows an agreement in February, 1868, wherein *Darwood* and *Goldenberg* agree to assign over the lease or grant which they had obtained in their own names to the company, and to work for them from that time at certain rates. Undoubtedly this document creates as between *Darwood* and the company the relation of employer or employed. It may be that this relation existed before, and that the document only embodied the terms under which *Darwood* and *Goldenberg* acted for the company in November, 1867, when the monopoly which was obtained in *Darwood's* and *Goldenberg's* names was really exercised on behalf of the company. But their Lordships are unable to find any proof that before November *Darwood* (*Goldenberg* may be thrown aside as he was not in the forest) can be considered as having acted as the servant or agent of the company. Until the lease of the 15th of July, giving the monopoly, took effect on the 1st of November, it would appear that the relation created by the agreement of March, 1867, of vendor and purchaser continued; it is certainly not shewn that any relation other than that of vendor or purchaser existed between the Defen-

dants and *Darwood* up to November, 1867, except that of agent to procure the lease in the previous July, but an agency to procure this lease is a totally different thing from an agency to work the forest on behalf of the company.

In this view, taking the exposition of the law by Mr. Justice *Willes*, which has been quoted, their Lordships are of opinion that the acts of *Darwood* cannot be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at that time it is not shewn that *Darwood* was a servant or an agent for the purpose of working in the forest on behalf of the company, or of doing any class of acts analogous to those complained of. It may be added that there is no proof of the Defendants having ever knowingly adopted or ratified those acts, or indeed of the acts having been committed for their benefit.

This being so, their Lordships are of opinion that the second action fails altogether.

They will therefore humbly advise Her Majesty that in the first action the judgment be varied by reducing it from the sum of Rs.52,050 to Rs.43,722; that the costs of the appeal be borne respectively by each party, but that the cross appeal be dismissed with costs. In the second action they will humbly advise Her Majesty that the judgment appealed against be reversed, and the suit dismissed, and that the Appellants have their costs in the Court below and of this appeal, and that the cross appeal be dismissed with costs.

Solicitors for the Appellants: *Johnsons, Upton, Budd, & Atkey.*
Solicitors for the Respondents: *Harrison, Beal, & Harrison.*

J. C.* 1878 March 13; April 13.

BHOOBUN MOHINI DEBYA AND ANOTHER PLAINTIFFS;

AND

HURRISH CHUNDER CHOWDHRY . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Grant—Construction—Gift to A., his Children and Grandchildren, confers absolute Estate—Santán Sreni.

A Hindu granted three villages as a talook at a certain rent to his sister by a sunnud which contained the following words: "You are my sister: I accordingly grant you a talook for your support . . . Being in possession of the lands and paying rent according to the tahut jumma, do you and the generations born of your womb successively (*santán sreni kramé*) enjoy the same. No other heir of yours shall have right or interest":—

Held, that the donee took an absolute estate. The expression, "no other heir of yours shall have right or interest," makes the absolute estate before given defeasible in the event (which did not occur) of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs.

In Hindu deeds words giving lands to a donee "his children and grandchildren," confer on him an absolute estate.

APPEAL from a decision of a Divisional Bench of the *Calcutta* High Court (Aug. 5, 1875), reversing the decree of the subordinate Judge of *Mymensing*, by which one *Chundermoni Debya*, since deceased, the mother of the Appellant, and one *Kali Soonduri Debya*, Plaintiffs below, had been declared entitled to the relief sought by them.

That relief was the obtaining possession of a talook which had been granted by one *Shumbhu Chunder Chowdry* in the year 1819 to his sister, *Kasiswari Debya*, mother of the Appellants. The Plaintiffs sought to recover possession of the grant as devisees of *Kasiswari*, from the Respondent, the son of *Shumbhu Chunder*, the grantor, who had taken possession of it on the death of *Kasiswari* in 1871, and the questions arising in the case turned upon the construction of the sunnud under which the talook was granted, according to which the Plaintiffs contended that *Kasiswari* took an absolute estate with a power of devise, and the Defendant that

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

the grant was limited to the male issue of *Kasiswari*, failing which, on her death the talook reverted to the right heir of the grantor, *i.e.* to the Respondent.

The Judges of the High Court dismissed the suit, not on the ground put forward by the Respondent, but on that of *Kasiswari* having no power under the grant to make a devise of the talook, and that the suit of the Plaintiffs, who sued as devisees, therefore failed.

The facts of the case are sufficiently disclosed in the judgment of their Lordships.

In reference to the construction of the document in question in this case, the judgment of the High Court (Birch and Morris, JJ.) contained the following passage:—

"The right interpretation to be put upon this document depends upon the meaning given to the words 'santán' and 'sreni kramé.' Does 'santán' signify son or sons, or issue generally? And do the words 'sreni kramé' signify in succession in the sense of in successive generations, or merely in the order first of you, and then of the issue born of your body. On the first point, it is clear that the term 'santán' bears the wider and more general meaning of issue, and is not confined to male progeny only. This interpretation was given to it by this Court in the case of *Kisto Kishore Bhuttacharjee and Others* v. *Seetamonee Bhuttacharjee* (1). On the second point, the true meaning of the words 'sreni kramé' seems to be 'in succession' in the sense of succession, first of the mother, and then of the children born of her womb. This may be fairly gathered from the context. The donor says 'you and the children born of your womb shall take in succession, but no other heirs of yours shall take.' If the donor had intended that the succession should be confined to *Kasiswari* and her lineal descendants, he would have used the words 'you and your children and your children's children, &c., shall take.' He would have used some such term as 'adi' after 'santán' to indicate the succession beyond the second generation. His avoidance of the usual practice in this particular shews that the restriction was intentional, and this intention is also apparent by the use

(1) 7 Suth. W. R. 320.

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of the word 'garbhaját,' born of the womb, and by the subsequently qualifying sentence, 'but no other heirs of yours shall take.' In the view that the donor intended to limit the succession to the lineal descendants of *Kasiswari*, and to exclude collateral heirs only, the word 'garbhaját' becomes redundant and meaningless. The same object would have been obtained by its omission; but its introduction is evidence that the donor had not only a limitation, but a limitation of a very particular kind in his mind at the time, and it manifestly gives the key to the words that follow, 'but no other heirs of yours shall take.' Indeed it might be argued, and with justice, that by the use of the word 'garbhaját' the exclusion of even an adopted son by *Kasiswari* was intended. The result is, that the donor in effect says, 'you and the children born of your womb shall take, but no one else who is an heir of yours shall take.' Taking this, then, to be the right interpretation of the sunnud, it remains to consider what is its legal effect and bearing upon the present case, as by its terms the tenure determines with the life of *Kasiswari* and the children born of her womb, the gift necessarily becomes the gift not of an absolute estate but of a life interest only. Therefore as *Kasiswari* could make no disposition of this property after her death the will of 3rd Assar, 1272, becomes inoperative, and Plaintiffs cannot take under it. The rule applicable to gifts is laid down by their Lordships of the Privy Council in the case of *Jotendromohun Tagore* v. *Ganendromohun Tagore* (1) in the following passage: 'In *Bengal* the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence, and capable of taking from the donor at the time when the gift is to take effect.' The evidence on the record sufficiently establishes the fact that *Chundermoni Debya*, Plaintiff No. 1, was in existence prior to the execution of the sunnud of 8th Bysack, 1226, and therefore under the above rule she is entitled to a life interest in the property. But we observe that *Chundermoni Debya* has not brought the present suit to establish a right of this kind. She has associated *Kali Soonduri Debya* with herself as co-Plaintiff, and each of these ladies seeks to recover a moiety of the property on the footing of the will

(1) 18 Suth. W. R. 359; 9 Beng. L. R. 377.

of *Kasiswari Debya*. But as already pointed out, the will is inoperative, and has no legal effect. The suit, therefore, is liable to be dismissed. We have delayed giving our judgment to this effect, because we wished to consider in what form our decree should be drawn up with due regard to the rights of *Chundermoni Debya* under the deed. Now, however, we learn from the pleader on her behalf that *Chundermoni Debya* is dead, and this question is thus set at rest by her death. *Kali Soonduri Debya* remains now the sole Plaintiff in the cause, and we therefore direct as against her that the judgment of the Lower Court be set aside, and that the suit be dismissed with costs, both in this Court and in the Court below."

Leith, Q.C., and *Doyne*, for the Appellant, contended in the first place that, assuming the High Court's decision as to the effect of the sunnud to be correct, viz., that it gave an estate to the grantee and the children born of her womb, it followed that *Kasiswari* took an absolute estate with a power of devise and not merely a life interest. In that case the will would operate in favour of the Appellants; but if she only took a life estate, in that case the will was immaterial. The case did not come within the *Tagore* decision.

There was no intention here to create an estate tail; the gift was absolute to the children subject to the mother's life estate. Santán is equivalent to offspring, progeny, descendants (see *Wilson's* Glossary), and therefore includes children and grandchildren. The limitation on *Kasiswari's* estate appears from the words "no other heir of yours shall have right or interest." There is no distinction between real and personal estate in Hindu law. Under English law a gift of personal estate to *A. B.* and her children would operate as a gift for life to *A. B.*, and thereafter a gift absolutely to the children. Here the gift to the mother is restricted, to the children it is unrestricted; and it is for the other side to shew that after the life interest of the mother the gift fails entirely. The intention of the grantor is clear, and is confirmed by the use of the word "talook," which means hereditary estate: see *Wilson's* Glossary. Santán cannot be limited to children only, for sreni is equivalent to row or line, and kramé means succes-

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sively: see *Wilson's* Glossary. The gift was to the mother and in succession to her children as distinguished from adopted children and collateral heirs. As regards misjoinder, *Chundermoni* is entitled as against the Respondent, but recognises her co-Plaintiff's interest in the estate; it is like the case of a man who has sold half his rights in the subject of litigation: see *Sreeram Hazra* v. *Gyarem Hatee* (1), where the co-Plaintiff was struck off as a superfluous party to the record, and a decree given in favour of the Plaintiff who was entitled: see Act VIII. of 1859, sect. 337.

Joshua Williams, Q.C., and *Mayne* (*Woodroffe* with them), for the Respondent, contended that on the true construction of the sunnud the estates and interests (if any) thereby created, beyond a life estate in *Kasiswari*, were void and invalid in law and incapable of being carried into effect. In the first place the sunnud attempted to create an estate tail contrary to Hindu law; and secondly, supposing there was a life estate with remainder over, that being a gift to a class, of whom some were, or might be incapable of taking, was bad as to all.

The children were intended to take as heirs; the words "from generation to generation" import an absolute estate: see *Rajah Nursing Deb* v. *Roy Koylasnath* (2). Then the importance of the negative words becomes apparent: it was an attempt to create an estate tail, an intention to create it: see *Jotendromohun Tagore* v. *Ganendromohun Tagore* (3). The grantor selects a line other than that recognised by law, and therefore the gift is void. It is clear that there was an intention to create an inheritable estate, and so the case can be distinguished from *Rajah Nursing Deb* v. *Roy Koylasnath* (2). [SIR ROBERT P. COLLIER:—If the gift is to her for her life, and then to her children, does your argument apply?] Yes; an estate to a person and his children, there being none alive, is equivalent to an estate tail. As to the argument that it was intended to give the estate to *Kasiswari* for life and afterwards to her children, it has been held that the donee must be a sentient being in existence: see *Ganendromohun Tagore* v. *Upendra Mohun Tagore* (4).

(1) 11 Suth. W. R. 507.
(2) 9 Moore's Ind. Ap. Ca. 55.
(3) 9 Beng. L. R. 377, 395; 18 Suth. W. R. 359.
(4) 4 Beng. L. R. (O. C.) 190.

Further, in interpreting this sunnud there are four different views as to its effect, viz., First: An absolute estate to grantee in fee simple, which is abandoned by the Appellants' counsel: see *Ganendromohun Tagore* v. *Upendra Mohun Tagore* (1). Secondly: The view of the High Court, viz., a gift for life to her, after her death, gift for life to her children, and no further. Thirdly: For life to the grantee, then to such of her lineal descendants absolutely as should be living at her death, to the exclusion of all other heirs, which is the view taken by the Appellant. Fourthly: To *Kasiswari* for life, and to her children who survived her absolutely.

The second view, which was taken by the High Court, is the correct one. It is a literal and reasonable interpretation. The object was to provide for the sister and for children of her womb, no further; the grandchildren were not objects of the donor's bounty, and the children take only life interests. The third was an attempt to create an estate not recognised by Hindu law, as shewn above. The fourth view of the construction is inconsistent with the terms of the sunnud. The grantor did not intend the general heirs of his sister to take, still less the general heirs of his sister's children. [SIR MONTAGUE E. SMITH:—Born of her womb. Does this mean that an estate given absolutely will revert if there is no child living at the date of her death?] That would be a contradiction in terms. [SIR MONTAGUE E. SMITH:—But it would give an absolute estate.] Not in accordance with terms of sunnud. It is contended that a gift either to children for life or to children absolutely is void. A gift can only take effect in favour of a donee who is a sentient being actually in existence at the time the gift comes into operation: *Tagore* v. *Tagore* (2); that is, in the present case, at the date of the gift. There was very slender evidence that *Chundermoni* was alive at the date of the gift. But *Kasiswari* might have had, and in fact had, other children born subsequently to the gift, and the intention was to benefit all equally. This intention could not take effect as to those who were, or might be, born subsequently, and therefore was

(1) 4 Beng. L. R. (O. C.) 183.
(2) 4 Beng. L. R. (O.C.) 190; 9 Beng. L. R. 399, 400, 408.

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bad as to all: see *Jee* v. *Audley* (1); *Leake* v. *Robinson* (2); *Srimati Brahmamayi Dasi* v. *Jageschandra Dutt* (3); *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (4).

Further, the plaint was based on the supposition that *Kasiswari* took an absolute estate, half of which she had devised to *Chundermoni*. The Plaintiff could not now claim the whole as donee under the sunnud.

Leith, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The facts which give rise to the questions of law into which this case resolves itself, are as follows:—

Shumbhu Chunder Surmana, in 1819, granted a talook to his sister, *Kasiswari Debya*, by a sunnud in the following words:—

"*Shumbhu Chunder Surmana.*

"Sunnud executed to the worthy to be remembered *Kasiswari Debya*, of good conduct, in the year 1226 B. S.:—

"You are my sister: I accordingly grant you as a talook for your support the three dehas (villages), *Hurripur*, *Futehpur*, and *Kudumtoli*, in chukla *Jonardunpore* in my zemindari, pergunnah *Mymensing*, at a tahut jumma of Rs.361, three hundred and sixty-one rupees, with the land and water, and trees, &c., comprised within the four boundaries, [and] all [rights] appertaining to the said mouzahs. Being in possession of the lands and paying rent according to the tahut jumma, do you and the generations (santán sreni) born of your womb successively (kramé) enjoy the same. No other heir of yours shall have right or interest. To this effect I have written and given a sunnud.

"The 8th Bysack, 1266."

Another translation of the document is given by the High Court substantially to the same effect.

At the date of the sunnud *Kasiswari* had one child only, a daughter, *Chundermoni*, one of the original plaintiffs in this suit.

(1) 1 Cox, 324.
(2) 2 Mer. 363, 390.
(3) 8 Beng. L. R. 410.
(4) 2 Ind. L. R. (Cal.) 262.

Kasiswari afterwards had a son who died in her lifetime, leaving a widow, who was a co-Plaintiff, suing as guardian of a son whom he had adopted.

Kasiswari held undisputed possession of the talook until her death in 1871, and by will devised it (together with other property) to the two Plaintiffs in equal moieties.

On the death of *Kasiswari*, the Defendant, as heir of his father *Shumbhu Chunder Surmana*, took possession of the talook, whereupon the Plaintiffs instituted the present suit to obtain possession of it, together with mesne profits from the date of their dispossession on the death of *Kasiswari*. Pending the suit the daughters of *Chundermoni* have been substituted for her as Plaintiffs.

The Plaintiffs claimed under the will of *Kasiswari*. A question, indeed, arose whether their plaint could be construed as containing an alternative claim on behalf of *Chundermoni* under the sunnud independently of the will, but in the view which their Lordships take of the case, this question becomes immaterial.

The Defendant denied the right of *Kasiswari* to dispose of the talook by will, contending that she took only a life estate under the sunnud. The principal ground on which he based this contention in the Court below was that, the terms "santán" "sreni kramé" imported only sons of *Kasiswari* living at the time of her death, and that these could only take, if at all, as donees under the sunnud.

No dispute was raised as to the genuineness of the will of *Kasiswari*, or its validity to pass whatever interest she was capable of devising. The subordinate Judge gave judgment in favour of the Plaintiffs. The grounds of his judgment, which are not very clearly stated, would appear to be that in his opinion *Chundermoni* took an absolute estate under the sunnud on the death of her mother, but that having elected to take under her mother's will, and to admit the co-Plaintiff to a half share of the estate, both the Plaintiffs were entitled to maintain the action against the Defendant. He gave the Plaintiffs a decree for possession together with wasilut, the amount of which is not disputed.

On appeal to the High Court, in addition to the contention that santán signified sons only, it was urged that the sunnud was an

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attempt to create an estate tail in contravention of Hindu law, and was therefore void except in as far as it gave a life interest to *Kasiswari*.

The High Court do not adopt this view, nor do they agree with the Appellant that the Hindu words which have been quoted import issue male only, but they regard them as bearing "the wider and more general meaning of issue." They hold that *Chundermoni* having been born before the date of the sunnud took under it a life interest in the talook, in succession to the life interest of her mother. But that the Plaintiffs not having sued in respect of the life interest, but having claimed under the will of *Kasiswari*, which she was incompetent to make, their suit must be dismissed. From this judgment the present appeal is preferred.

At their Lordships' Bar the main grounds on which the judgment of the High Court has been supported are—

1. That the sunnud is an attempt to create such an estate as is known in *England* by the name of an "estate tail," in contravention of Hindu law, which does not recognise such an estate.

2. That even if this be not so, the gift to the children of *Kasiswari* to be born after its date as well as to those then born, is in contravention of the rule of Hindu law that no gift can be made to any person who is not "a sentient being" at the time of gift. In support of these propositions the case commonly called the *Tagore Case* (1) was quoted.

It was further argued that if the gift were void because made in favour of a class who could not legally take—that is to say unborn children—it could not be validated *quoad Chundermoni* (who happened to be born at the time), by changing it from a gift to a class, into a gift to a designated individual. And in support of this proposition the cases of *Jee* v. *Audley* (2), and *Leake* v. *Robinson* (3), were cited.

It appears from the sunnud that the donor intended to convey more than a life estate. If the estate which he intended to convey was one which the law prohibits, effect cannot be given to his in-

(1) 9 Beng. L. R. 377; 18 Suth. W. R. 359.

(2) 1 Cox, 324.

(3) 2 Mer. 364.

tention; but before coming to this conclusion their Lordships must be satisfied that the instrument does not fairly admit of being construed in a sense to which the law will give effect.

In the judgment of the *Tagore Case* (1) the following passage will be found:—

"If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in *England*) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shewn his intention to create, although he adds a qualification which the law does not recognise."

The doctrine herein expressed had been frequently acted upon by the Courts in *India*, who have decided that words giving lands to the donee, "his children and grandchildren," conferred upon him an absolute estate. (See judgment of Sir *Barnes Peacock* in the *Tagore Case* (2).)

If the words of the sunnud, "You are my sister: I accordingly grant to you a talook for your support," had stood alone, it might have been open to question whether an absolute grant, or a grant for life only, was intended: coupled with the words that follow "being in possession of the lands and paying rent according to the tahut jumma, do you and the generations born of your womb successively enjoy the same;" they appear to import an absolute estate, such as would have been given had the words been "your children and grandchildren . . . ." And no inference so far arises that the donor had an English estate tail in his contemplation, as the testator in the *Tagore Case* undoubtedly had.

(1) 9 Beng. L. R. 395.

(2) 4 Beng. L. R. (O.C.) 182.

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The only difficulty is caused by the words which follow, "no other heir of yours shall have right or interest."

Upon the best consideration which their Lordships have been able to give to the meaning of these negative words, it appears to them that they may be read as referring to the time of the death of *Kasiswari*, that their effect is to make the absolute estate before given defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs. That there is nothing in such a condition repugnant to Hindu law appears from the decision of this tribunal as to an executory devise in the case of *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1), as explained in the *Tagore Case*.

Their Lordships are, therefore, of opinion that *Kasiswari* took the whole estate defeasible on the happening of an event which did not occur, and that she had, therefore, an estate which she could dispose of by will.

It follows that the Plaintiffs are entitled to succeed in this suit. It is unnecessary to decide what their rights may be *inter se*.

Their Lordships will, therefore humbly advise Her Majesty that the decree of the High Court be reversed, and that the decree of the Subordinate Court be affirmed. The Appellants will have their costs in the Courts of *India*, and of this appeal.

Solicitors for the Appellants: *Watkins & Lattey*.
Solicitors for the Respondent: *Wrentmore & Swinhoe*.

(1) 9 Moore's Ind. Ap. Ca. 134.

TEKAIT DOORGA PERSAD SINGH . . PLAINTIFF;

AND

TEKAITNI DOORGA KONWARI AND ANOTHER . . . . . } DEFENDANTS.

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May 10, 11, 14, 16, 17.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Res judicata—Declaratory Decree—Discretion of the Court.

The Appellant having been a party to a former suit in which the Respondent obtained a decree for possession of the estate in question as mother and heiress of the last proprietor, is barred by such decree from afterwards recovering possession on the ground that the Respondent is not such heiress.

Although such decree barred the Appellant from setting up in this suit a family custom for the purpose of shewing that he was entitled to possession during the life of the Respondent, he is not thereby barred from shewing that upon her death, if he survives, he will be entitled, under such custom, to succeed her, and therefore to have a certain deed executed by her declared illegal and inoperative after her death.

Their Lordships, however, declined to remand the case for adjudication thereupon. A declaratory decree was matter of discretion, and, while the necessary investigation would cause great delay and expense, the claim of the Appellant was contingent on his surviving the Respondent, and the decree would not bind other members of the family not parties to the suit, with possibly preferable titles.

APPEAL from a judgment and decree of the High Court at *Calcutta* (June 6, 1873) dismissing the Appellant's suit with costs, and setting aside the decree of the Subordinate Judge of *Bhagulpore* (Dec. 29, 1871).

The facts of the case are sufficiently set forth in the judgment of their Lordships.

Woodroffe and *Cutler* (*Roddam* with them), for the Appellant, contended that the decree in the former suit was no bar to the present. In the former suit no issue was raised as to primogeniture, and no issue as to the estate being impartible. The issues were confined to the estate being ancestral and joint. It was held that it was ancestral, but impartible, descending from

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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father to son, the younger branches taking maintenance. In this suit the Courts in *India* refused to allow the real state of affairs to be discussed and to amend the issues for that purpose. But on their finding that the property was ancestral and impartible the presumption arises that it descends by primogeniture to the Appellant according to Mitakshara law, unless a contrary custom be shewn. The evidence also establishes a custom of primogeniture both as a family and a local custom. No doubt if the property is joint and partible, then there are male heirs in existence preferential to the Appellant.

The suit is not barred either under sect. 2 of Act VIII. of 1859, or as to the claim to present possession, or as to the claim to a declaration of reversionary right. There are three requisites for the application of the doctrine of *res judicata:* see Lord *Westbury's* judgment in the suit against *Kattama Natchiar* (1). When a Plaintiff claims an estate and the Defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. In order to make good a defence of *res judicata* the same point must have been in issue in both suits; there must have been *idem corpus, idem jus, eadem causa petendi:* see Lord *Redesdale* on Pleadings, 5th Ed., p. 279. Reference was then made to *Outram* v. *Morewood* (2), *Khugowlee Sing* v. *Hossein Bux Khan* (3), *Hunter* v. *Stewart* (4), *Moss* v. *Anglo-Egyptian Navigation Company* (5), *Saikappa Chetti* v. *Kattama Natchiar* (6), *Chinniya Mudali* v. *Venkatachella Pillai* (7), *Woomatara Debia* v. *Unnopoorna Dassee* (8). [SIR MONTAGUE E. SMITH referred to *Krishna Behari Roy* v. *Brojeswari Chowdranee* (9).] That case is distinguishable as referring to status. *Jogendra Deb Roy* v. *Funindro Deb Roy* (10), *Soorjomonee Dabee* v. *Suddanund Mohapatter* (11). [SIR BARNES PEACOCK:—Although the claim of the Appellant to a right of inheritance and present possession is

(1) 11 Moore's Ind. Ap. Ca. 72.
(2) 3 East, 365.
(3) 7 Beng. L. R. 673, 679.
(4) 31 L. J. (Ch.) 346; 4 D. F. & J. 168.
(5) Law Rep. 1 Ch. 108.
(6) 3 Madras H. C. R. 84.
(7) 3 Madras H. C. R. 320.
(8) 11 Beng. L. R. 158; 18 Suth. W. R. 163.
(9) Law Rep. 2 Ind. Ap. 283.
(10) 14 Moore's Ind. Ap. Ca. 367.
(11) 12 Beng. L. R. 304; 20 Suth. W. R. 377.

barred, the question still remains whether he is the proper person in this suit to vindicate the claims of the reversioners.] He may rely upon the custom at least to that extent and for that purpose, viz., to shew his reversionary right. The evidence shews that the property is ancestral, impartible, and descends entire according to the rule of primogeniture according to the local and family custom. Moreover, if the evidence of custom is insufficient, if the estate is shewn to be ancestral and impartible, then, by the Mitakshara, the rule of primogeniture applies. As regards the claim of a woman to succeed, inheritance by females is, under Hindu law, an exception to the ordinary rule which favours males. It is an anomaly, and rests upon special texts: see Mitakshara, c. II., sect. 1, §§ 8, 12, 15, 35; as regards daughters, see c. II., sect. 2, §§ 3, 4; mothers, c. II., sect. 3, § 2; Cf. Dayabhaga, c. XI., sect. 2, § 11, sect. 4. The course of succession by primogeniture is also abnormal and anomalous. Reference was then made to *Ramalakshmi Ammal* v. *Sivanantha Perumal Setturayer* (1). It is at variance with Mitakshara law that in cases of ancestral impartible property widows should come in whilst males exist of the immediate family to which the property belongs: see *Bhyah Ram Singh* v. *Bhyah Uzah Singh* (2); *Macnaghten's* Hindu Law, vol. i. p. 53; *Chowdry Chintamun Singh* v. *Mussumut Nowlakho Konwari* (3); *Hurronath Mullick* v. *Nittanund Mullick* (4); *Maharani Hiranath Koer* v. *Baboo Ram Narayan Singh* (5); *Koonwur Bodh Singh* v. *Seonath Singh* (6); *Periasami* v. *The Representatives of Salugai* (7).

Doyne, for the Respondent, contended that the principle of *res judicata* applied, and was sufficient to defeat the Appellant's claim to present possession by right of inheritance. As regards his claim as reversioner, it was proved and admitted that he was not the reversionary heir according to the ordinary law of succession; and if the principle of *res judicata* did not apply so as to bar the Appellant's claim to the reversion under the custom, still he had

(1) 14 Moore's Ind. Ap. Ca. 570; 12 Beng. L.R. 396; 17 Suth. W. R. 553.
(2) 13 Moore's Ind. Ap. Ca. 373.
(3) Law Rep. 2 Ind. Ap. 263.
(4) 10 Beng. L. R. 263.
(5) 9 Beng. L. R. 274.
(6) 2 Sel. Rep. 92.
(7) *Ante*, p. 61.

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failed on the evidence in this suit to prove any custom which would entitle him to succeed on the death of the Respondent. He had, therefore, no *locus standi* to question the title of the female Respondent or the validity of her sale to the co-Respondent. Moreover, the Appellant, as a contingent reversioner, was not entitled to a declaratory decree as to the invalidity of the sale in the lifetime of the Respondent; or if he were, the legal necessity for the deed was amply established by the evidence.

Woodroffe replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is a suit brought by *Doorga Persad Singh*, son of *Gopi Nath Singh*, alleging himself to be the proprietor of talook *Guddi Chakai* and other property in Zillah *Monghyr*. The suit is against *Tekaitni Doorga Konwari*, widow of *Futteh Narain Singh*, deceased, and mother of *Gurbh Narain Singh*, deceased, and also against *Maharaja Joy Mungul Singh*. It was brought first, to obtain possession from the widow by adjudication of the right of inheritance of the Plaintiff in accordance with koolachar or family usage in reference to the property in suit left by *Tekait Gurbh Narain Singh*, son of the late *Tekait Futteh Narain Singh*. Secondly, for an adjudication and order with respect to the right of reversion to the said estate, that a deed which had been executed by the widow in favour of the Defendant *Joy Mungul Singh* should be declared illegal and inoperative after the decease of the widow, the Defendant No. 1.

The property was formerly the property of *Dhurm Narain Singh*, and their Lordships think it must be taken to be joint ancestral family property although impartible. Upon the death of *Dhurm Narain Sing*, who left several sons and other lineal descendants, the property descended to his grandson, *Loke Narain Singh*, the father of that grandson, *Juggernauth Singh*, having died in the lifetime of *Dhurm Narain*. Upon *Loke Narain Singh's* death the estate descended to *Futteh Narain Singh*, the husband of the present Defendant No. 1. *Futteh Narain Singh* left three widows, who upon his death claimed to have the estate registered

in their names. The present Plaintiff intervened before the Collector and objected to the registration of the property in the names of the three widows, but the Collector decided in favour of the widows, and their names were registered as the proprietors of the estate upon the death of *Futteh Narain*. After that registration the present Defendant gave birth to a son, *Gurbh Narain Singh*, who lived for a short time and died in his infancy. The Plaintiff claims that upon the death of *Gurbh Narain* he was entitled to succeed to the estate, and that the widow was not entitled, according to the Mitakshara law and the custom of the family, to succeed as the mother and heiress of her son.

With regard to the claim to recover possession from the widow, the answer set up is that a former suit was brought by the widow after the death of her son for the purpose of recovering possession of two thirds of the property from the other two widows with whom the present Plaintiff, who was a Defendant in the former suit, was said to be in collusion, and also to have her possession confirmed as to her own one third. A decree was given in that suit in favour of the present Defendant, the widow, who was the Plaintiff in that suit. The plaint in that case is not in evidence, but it is to be collected from the judgment of the Court of first instance in that suit that it was brought by the present Defendant as mother and heiress of *Gurbh Narain Singh*, deceased. The present Plaintiff as Defendant in that suit in his written statement set up the following defence. He said, "The Plaintiff is not entitled to succeed to the properties left by *Tekait Futteh Narain Singh*. The aforesaid *Tekait* during his lifetime, and, after his death, his widows and the minor son which was born to him, lived in commensality with me the Defendant. The whole of the property in suit is ancestral, hence, according to the Mitakshara Shastra, after the death of the said *Tekait* and his minor son, I the Defendant, the paternal cousin of *Tekait Futteh Narain Singh*, am entitled to the ancestral estates." He goes on in the 4th paragraph, "On the 13th Jayt 1274 Fusli, I the Defendant on account of my being the rightful party was by the consent of all the three widows of *Tekait Futteh Narain Singh*, the amlahs, ryots, and lessees and others, installed as the Gadinashin of talook *Chakai* according to the usage which has prevailed of old. Since that date I have been enjoying pos-

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session of all the mouzahs in suit." He there says that he was installed according to the usage, and therefore it may be taken that, notwithstanding the estate was joint family property, he claimed to be installed because according to family usage it was an impartible estate to which he as the eldest branch of the family was entitled to succeed. The Court of first instance in that suit decided that the claim of the Plaintiff be decreed with this specification, "That the Plaintiff aforesaid do recover possession of two thirds of the estate claimed," that is, the two thirds which were held by the other widows with whom the Defendant was alleged to be colluding, "and that her possession of one third be confirmed." There was therefore a decision in that suit between the Plaintiff, who is the present Defendant, and the present Plaintiff, who was the Defendant, that the widow was entitled to succeed as the mother and heiress of *Gurbh Narain Singh* her son. An appeal was preferred to the High Court, and the High Court affirmed that decision.

The question now is, whether in the face of that adjudication the Plaintiff is entitled in this suit to recover the possession of the property upon the ground that he, and not the Defendant as mother of *Gurbh Narain*, was entitled to succeed upon his death. It is contended on behalf of the Plaintiff that he did not in that suit set up the family usage which has been set up in the present suit, and that consequently the adjudication in the former suit is no bar to his recovering possession. The case of *Hunter* v. *Stewart* (1) was cited, in which Lord *Westbury* held that, as the allegations and equity in the first suit were different from the allegations and equity in the second suit, the decision in the first suit was no bar to the proceeding in the second. But there it was expressly stated that the equity in the second suit was different from that which had been set up in the first suit, and that the allegations were also different. In this case, although the allegations are different the claim is the same. The claim on the part of the widow in that suit was based upon her title to succeed as the mother and heiress of her son. The present Plaintiff, who was the Defendant in that suit, relied upon his own title and denied that of the mother, the present Defendant No. 1, but it

(1) 31 L. J. (Ch.) 346; 4 De G. F. & J. 168.

was adjudged against him, that the mother was entitled to succeed as the heiress of her son.

In a case which is referred to in the judgment of the High Court, reported 11 *Moore's* Indian Appeals, p. 73, it is said, in the judgment pronounced by Lord *Westbury*, "When a Plaintiff claims an estate, and the Defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward." If the Defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time. The decision in the former suit would be utterly useless if the present suit could be maintained. The Plaintiff in his present suit, in the 8th paragraph of his plaint, says, "On the strength of the aforesaid decree, the Defendant No. 1," that is, the widow, "put your petitioner out of possession." If that decision was correct she was entitled to put him out of possession. But in the next paragraph he says, "The cause of action arose from the said date when your petitioner's dispossession took place." In effect, he says, that although the mother took possession under the decree in the former suit, the taking of possession under that decree gave him a right to sue her to recover the possession back again from her. If such a suit could be maintained there would be no end to litigation.

A case was referred to from the 3rd *Madras* High Court Reports, p. 320, in which Chief Justice *Scotland* seems to have been of opinion that if the same facts were not set up in the former suit, a decision in that suit would not be a bar in the second suit. The ground, however, upon which Chief Justice *Scotland* thought that the former judgment could be impeached was that the Court had refused in the first suit to allow the party who wished to impeach the judgment to go into the case which he set up in the second suit.

In the 2nd Law Reports, Indian Appeals, 283, a similar question was brought before the Judicial Committee. It is said, in the judgment delivered by Sir *Montague Smith*, "It was suggested by Mr. *Cave* that the former judgment ought not to be binding

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because certain witnesses having been examined before the present Appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals that were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that that cannot affect the operation of the final judgment, which must be taken to have been rightly given."

But it appears in the present case that the family custom was brought before the Court in the former suit. They say: "As to the third ground, *Doorga Persad Singh* attempted to give evidence that there is a family custom or koolachar, by which, in this family, females were excluded from inheritance. He did not, make any averment to that effect in his written statement, and, therefore, did not, perhaps would not, pledge himself to it on oath or solemn affirmation. He did not give the Plaintiff any warning that she would have to meet any such case. No issue was raised on it, and down to the time when he examined his witnesses, and even in his written grounds of appeal before us, there is no statement of the particulars of this custom or koolachar, the existence of which he now suggests. He does not even aver in his written grounds of appeal that such a custom is proved."

It was contended that the cause of action in the suit in which the present Defendant was Plaintiff was not the same cause of action as that which is set up by the Plaintiff against her in the present suit. A similar point was considered in the case reported in 2nd Law Reports, Indian Appeals, to which reference has already been made. It was there said (p. 285): "Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, inasmuch as it is said that the case does not come within sect. 2 of Act VIII. of 1859. Now the section is this: 'The civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the

same parties or between parties under whom they claim.' Their Lordships are of opinion that the expression 'cause of action' cannot be taken in its literal and most restricted sense. But however that may be, by the general law, when a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the *status* of one of them in relation to the other, it cannot in their opinion be again tried in another suit between them. It is not necessary for their Lordships to go at length into the reasons for their decision, because those reasons appear in a recent judgment of this Board in the case of *Soorjomonee Dabee* v. *Suddanund Mohapatter* (1). In that judgment it is said, after reference to the 2nd clause of Act VIII., 'Their Lordships are of opinion that the term "cause of action" is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause was in substance to declare the will invalid on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the *Code of Procedure* would by no means prevent the operation of the general law relating to *res judicata* founded on the principle, "*nemo debet bis vexari pro eâdem causâ.*" This law has been laid down by a series of cases in this country with which the profession is familiar. It probably has never been better laid down than in a case which was referred to in volume 3 of *Atkyns, Gregory* v. *Molesworth* (2), in which Lord *Hardwicke* held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. *Smith* to the case of the *Duchess of Kingston.*' A decision of the High Court of *Bengal* has been referred to, the case of *Sheikh Rahmatulla* v. *Sheikh Sarintulla Kagchi* (3), as having a

(1) 12 Beng. L. R. 304; 20 Suth. W. R. 377.

(2) 3 Atkyns, 626.

(3) 1 Beng. L. R. F. B. 61. The reference to this case seems to be a mistake. Probably the case intended to be referred to is *Kriparam* v. *Bhugawan Das*, 1 Beng. L. R. A. C. 68.

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contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which they have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it."

Their Lordships think it clear that the decision in the former suit, that the Plaintiff as mother was the heiress of her son, and that she as such heiress was entitled to possession, is conclusive against the present Plaintiff, who was a party to that suit, that she was so entitled, and that she having taken possession under that decree the Plaintiff is barred by the adjudication from recovering the possession from her upon the ground that she is not the heiress, and that he was entitled to succeed to the property upon the death of her son.

As to the second portion of the claim, namely, whether the Plaintiff is entitled to have it declared that the deed which the widow executed in favour of *Joymungul* is void and invalid as against the reversionary heirs, the Plaintiff must prove that he is the person presumptively entitled to succeed upon the death of the Defendant No. 1. No doubt the family custom might be set up in this suit for that purpose, for although the Plaintiff is barred by the former adjudication from setting it up for the purpose of shewing that he is entitled to possession during the life of the Defendant No. 1, he is not thereby barred from shewing that upon her death, he, if he survives, will be entitled to succeed her. See the case of *Barrs* v. *Jackson* (1).

The Plaintiff in his plaint says: "The aforesaid estate was originally the ancestral property of the ancestors of *Tekait Dhurm Narain Singh*, the ancestor of Plaintiff. The aforesaid property as a raj is not divisible, and according to the ancient family usage the succession has always run in this manner, that the eldest heir male of the superior branch succeeds to the entire estate to the exclusion of other male heirs of the inferior branch, who only receive suitable maintenance; no widow or any female heir after the decease of the proprietor acquires a right to succeed. In the event of the decease of the proprietor of the mehal in dispute leaving a female heir or female heirs who have descended from

(1) 1 Y. & C. 585.

females, the eldest heir male of the eldest branch of the second degree, which said branch may have descended from males, becomes the heir and successor, to the exclusion of females and the aforesaid heirs. In fact, this practice obtains in other zemindaries, known as Gadis, in pergunnah *Chakai* and *Khurugdiha* in the neighbourhood of talooka *Chakai*, the proprietors and occupants whereof are of the same caste as the Plaintiff and his ancestors. Conformably to this ancient usage, the property in suit passed to the late *Tekait Futteh Narain Singh*, and after him to the late *Gurbh Narain Singh*, son of the aforesaid *Futteh Narain Singh*. *Tekait Gurbh Narain Singh* died a minor unmarried in the month of Cheyt, 1272, F.S., leaving Plaintiff the eldest male heir in the eldest branch of the second degree of the said family, and, according to the family usage, your Petitioner is entitled to succeed to the disputed property." Then he mentions the former suit, and says: "Should your Petitioner not be held entitled to immediate possession of the property in suit, he, as the next heir, is entitled (consistently with the practice of succession referred to above) to the reversionary right in the property after the decease of the Defendant No. 1. The alienation of the said six annas, which is alleged to have been made for the payment of bond debts, was not made for such a purpose by which in the event of the Defendant No. 1 being a female heir, such alienations would be binding upon the reversioner, nor was it made under legal necessity, which entitles the purchaser to hold possession for a longer period than the lifetime of the vendor. Your Petitioner therefore prays that he may put in possession of the property in suit; but should the Court not deem him deserving of this relief, that an order be passed in reference to the aforesaid alienation, declaring the said alienation ineffectual after the demise of the Defendant No. 1, and that the reversioner is not bound by it."

In the present case there are other members of the joint family nearer in degree to the deceased *Gurbh Narain* than the present Plaintiff, who, in the absence of family custom, might be entitled (under the ordinary Mitakshara law) to succeed to the estate, assuming it to be joint family property; indeed, that fact was not disputed. The impartibility of the property does not destroy its nature as joint family property, or render it the sepa-

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rate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate. The rule upon this subject was stated in the *Shivagunga Case* (1). It is there said: "The zemindary is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu law prevalent in that part of *India*, with such qualifications only as flow from the impartible character of the subject. Hence if the zemindar at the time of his death and his nephews were members of an undivided Hindu family, and the zemindary though impartible was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zemindar at the time of his death, was separate in estate from his brother's family, the zemindary ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but *Gowery Vallabha Taver's* widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that even if the late zemindar continued to be generally undivided in estate with his brother's family, this zemindary was his self-acquired and separate property."

The same rule was laid down by their Lordships in a recent case which was decided on the 12th of February in the present year, the case of *Periasami* v. *The Representatives of Salugai* (2), "It may be desirable, before their Lordships approach the direct question to be decided, briefly to recapitulate some of the facts relating to this estate. *Oiya Tevar*, the then zemindar of *Padamattur*, died in 1815. He was succeeded by his eldest son, *Muttu Vaduga*. That person had two brothers, and therefore, whether *Oiya Tevar* were previously joint with his brother *Gouri Val-*

(1) 9 Moore, Ind. Ap. Ca. 588. (2) *Ante*, p. 61.

labha, the Istimirar zemindar of *Shivagunga*, in respect of *Padamattur* or not, the later estate must be taken to have descended to *Muttu Vaduga*, as ancestral estate. He would therefore necessarily be joint in that estate so far as was consistent with its impartible character with his two younger brothers, the latter taking such rights and interest in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate though impartible was up to the year 1829 in a sense the joint property of the joint family of the three brothers."

Unless then the Plaintiff can establish the family custom or koolachar which he has set up, he is not entitled to sue for a declaration in respect of the deed. Two issues were raised as to the alleged custom. First, "Is there a koolachar in the family by which females are excluded from succession or not?" And, secondly, "Does the law of primogeniture regulate the succession to property in the family or not?" The Judge of the First Court did not decide them. He merely ordered that a decree be passed in favour of the Plaintiff in this way; that the Plaintiff should be taken to be the next heir after the death of *Mussumat Doorga Konwari* the Defendant, and that at that time he would be competent to bring a suit for the cancelment of the deed of sale executed in favour of *Maharajah Joy Mungul Singh*. He came to that decision upon the ground that other nearer heirs had not come in to dispute the Plaintiff's right, but he did not express any opinion as to the evidence which was given in support of the custom.

Upon appeal from that decision to the High Court, that Court found that the custom had not been proved. They say, "We are of opinion that no family usage or koolachar, either excluding females or giving the preferential right of succession to direct descendants in the eldest male line, has been proved. Nearly the whole of the instances adduced by the witnesses as proof of koolachar must be referred to succession to undivided estate under Mitakshara law." In a subsequent part of their judgment they say, "In fact all the witnesses rely principally on local custom as

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applying to *Soorujbunsi Rajpoots.* But the evidence shews that in pergunnah *Purra,* a Ghatwali zemindary in *Beerbhoon* held by *Soorujbunsi Rajpoots,* a woman had succeeded. We are of opinion that the evidence fails to prove any family or local custom excluding the succession of females, and also fails to prove a koolachar or local custom whereby the succession goes otherwise than under the ordinary Mitakshara law, as applied to impartible estates, under which it is admitted that the Plaintiff would not, under existing circumstances, be the next reversioner, inasmuch as there are at least two persons who would be preferential heirs to him. With respect to local custom even if the Plaintiff were entitled to raise that question in this case, which we think he is not, we are of opinion that there is no defined district pointed out over which the alleged custom extends."

This is not a case in which the Court was called upon to set aside the deed. It was merely asked to declare that the deed to *Joymungul* was not binding against the reversioner. It is entirely a matter of discretion whether to make any declaration of that kind or to leave the question open until the widow's death.

There is very conflicting evidence with regard to the deed, and as to the existence of such a necessity for the first Defendant's alienating a portion of the estate as would render the deed in favour of *Joymungul* valid against a reversionary heir. If it could be proved that there was a legal necessity for raising a portion of the money which formed the consideration for the deed, but not the whole of it, the deed would not be wholly void as regards the Plaintiff, but would be valid as against him to charge the estate for the amount necessary to be raised. The evidence is not such as to enable their Lordships to determine what, if any, portion of the advances made to the Defendant No. 1, were made for purposes for which, according to Hindu law, she would as an heiress have been entitled to alienate the estate. Therefore, even if their Lordships should affirm the findings upon the first and second issues of fact in favour of the Plaintiff, it would be necessary to remit the case to the Lower Court to inquire whether all or any, and, if any, what part of the advances which formed the consideration for the deed were made for purposes for which the Defendant No. 1 could lawfully alienate a portion of the estate; a course

which was adopted in the case reported in 8 *Moore's* Indian Appeals, 556.

Such an inquiry would be attended with considerable expense, and would cause great delay, and if the inquiry should result in a finding favourable to *Joy Mungul*, the decision might not be final in his favour, because the present Plaintiff might die in the life-time of the widow, and the estate might never come to him. Further, there are others who might prove a preferable title to the Plaintiff and to the Defendant No. 1, and who would not be bound by any decision in this or in the former suit to which they are no parties. It appears, therefore, to their Lordships that they would not be exercising a sound discretion in sending the case for a further inquiry, which, after causing considerable expense and delay, would not be binding upon the whole family.

Under these circumstances, therefore, their Lordships think that they ought not to advise Her Majesty to make a declaratory decree with respect to the deed executed in favour of *Maharajah Joy Mungul Sing*. In this view of the case any finding upon the first and second issues of fact becomes unnecessary, and their Lordships abstain from expressing any opinion as to the finding, or rather the expression of the opinion of the High Court upon those issues, so that it may be left open to all parties hereafter to raise the question as to the family custom set up by the Plaintiff. Their Lordships will therefore humbly advise Her Majesty to set aside the finding of the High Court upon the first and second issues of fact as being unnecessary, and to affirm their decree dismissing the Plaintiff's suit. It will then be open to any of the parties to raise the question of family custom hereafter, if they deem it necessary, and the decree in this suit will not be *res judicata* as to the first and second issues of fact. Their Lordships think that the Appellant, having failed in his appeal, the great object of which was to recover possession from the widow, must pay the costs of this appeal.

Agent for the Appellant: *F. Barrow.*
Agent for the Respondent: *T. L. Wilson.*

J. C.* MESSRS. JARDINE, SKINNER, & CO. . . DEFENDANTS;

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AND

May 28, 29. RANI SURUT SOONDARI DEBI. . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Right of Occupancy—Ijara—Right to Renewal.

By the terms of an ijara (1865) the Defendants were entitled at the end of a term of five years to a renewal of their lease of the chur land in dispute at a rent to be fixed according to the measurement of the land to be made at that time, and to the productive powers of the land. Three years after the expiration of the said term a notice was served on the Defendants to come to a new settlement with the Plaintiff, and in 1874 the Plaintiff sued to recover possession. The Defendants claimed a right of occupancy acquired under Act VIII. of 1869 (*Bengal*), or under Act X. of 1859:—

Held, that the Defendants' holding as ijaradars prior to and during the lease of 1865 did not create in them a right of occupancy, and that the plaintiff had a right to turn the Defendants out of possession at the expiration of the term of five years, except so far as that right was qualified by the stipulation for a renewal; that the Defendants at the expiration of that lease had an equitable right to a renewal not exceeding five years, according to the stipulations in the agreement; but that it was too late to rely upon their title to a renewal, which if it had been granted would now have expired.

APPEAL from a decree of the High Court (May 23, 1876) by which a decree (Jan. 21, 1875) of the Judge of *Moorshedabad*, in *Bengal*, was reversed.

The suit was brought to recover possession of a 2 annas 15 gundahs undivided share of certain Diara alluvial lands. By the decree of the High Court it was amongst other things decreed that the Respondent should recover possession of the said share of the lands save and except so much of them as was in the actual occupation of the Appellants, in respect of which it was thereby declared that the Respondent was entitled as zemindar to collect the rents for the Appellant.

The plaint, referring to an ijara or lease of the said share of the disputed lands which had expired, and to certain stipulations therein providing for a renewal of the lease, alleged that the

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Respondent had caused a measurement of the said lands, and an assessment of the rents to be paid for the same in pursuance of and in accordance with those stipulations, but that the Appellants had failed thereupon to perform their part of those stipulations by not accepting a pottah and granting a kubulyut embodying such measurement and assessment; and the Respondent submitted that therefore she was entitled to have khas possession of her said share of the said lands, and to eject the Appellants therefrom. The written statement of the Appellants admitted the stipulations, and (among other things) traversed all the allegations as to measurement and assessment of the rents, as set forth in the plaint, and submitted that they were not bound to accept the quantities in the pretended measurement, or the rates in the pretended assessment, and asserted that they had all along been ready and willing to comply with the terms and conditions of renewal provided for in the said stipulations of which the Respondent had notice. The Judge of the lower Court found and decided (amongst other things) to the effect, that the Respondent's alleged measurement and assessment were unreliable and worthless, and that the Appellants were not bound in law to accept them; and the Judge also found that the Appellants had not committed any breach of the said stipulations, and had proved themselves all along ready and willing to comply with them, as alleged by them, and so ought not to be ejected. The Judges of the Division Bench of the High Court, in their judgment above-mentioned, although deciding that the Appellants had no rights as jotedars, decided that under the stipulations of the lease their occupancy was to continue beyond the term of the lease, it being open to both parties to make a fresh agreement, but that they had not shewn what would have been a fair and reasonable measurement and rate.

The facts of the case sufficiently appear in the judgment of their Lordships.

Sir *James Stephen*, Q.C., *Leith*, Q.C., and *C. Bowen*, for the Appellants.

Doyne, for the Respondent.

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JARDINE, SKINNER, & Co. v. RANI SURUT SOONDARI DEBI.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Appellants in this case are Messrs. *Jardine, Skinner, & Co.* They were the Defendants in a suit brought against them by *Rani Sarut Soondari Debi* to recover possession of a 2 annas 15 gundas share of upwards of 20,000 bighas of chur land.

The question is whether the Plaintiff was entitled at the time when she commenced her suit to treat as trespassers the Defendants who had unquestionably held as Ijaradars under her. The ijara was dated the 12th Jeyt, 1272, corresponding with the year 1865, and was to continue for a term of five years. It comprised a large quantity of land besides the chur land now in dispute. As to the latter the kubulyat executed by the Defendants' agent contained the following stipulation: "Having fixed a yearly rent of Rs.609. 4*a.* for your nij share of 20,950 bighas, describing them as per boundaries given in the schedule below, you have included it in the aforesaid ijara rent of Rs.4417. 9*a.* 5*r.* I shall be in possession of the said chur as a jote. Upon the expiration of the term of the ijara of the said mehals, a pottah and kubulyut will be respectively given and taken in respect of the jote, regard being had to the quantity of land and amount of rent that shall be determined to belong to your nij share in accordance with the productive power of the land within the area determined by a measurement of the said chur. If I do not take a pottah and give a kubulyut within two months after the fixing of the rate of that land, you will make a settlement with others." In other words, the Defendants were to be entitled at the expiration of the term of five years to a renewal of the lease of the land in dispute at a rent to be fixed according to the measurement of the land to be made at that time, and to the productive powers of the land.

The Defendants at the expiration of the lease continued in possession. Nothing was done with regard to assessing the rent for the new lease for nearly three years afterwards, but the Defendants remained in possession, and continued to pay the old rent into Court, the Plaintiff having apparently refused to accept it. In Pous 1279 the Plaintiff caused a notice to be served upon the Defendants. That notice, after referring to the above-mentioned

stipulation in the kubulyut, and stating that a jummabundi had been made of the said land assessing the rent at Rs.1448. 8*r*. 2*a*. under a measurement, the rates being fixed in accordance with the productive powers of the various sorts of land mentioned in the schedule, and the rates paid by tenants of a similar class for lands of a similar description, proceeded as follows: "Notices have been repeatedly given to you requiring the exchange of pottah and kubulyut, but you have notwithstanding failed to appear and make any settlement. For this reason you are again informed by means of this notice that in accordance with the provisions of the kubulyut dated 14th Jeyt 1272, B.S., given by you, you shall appear personally or through your manager or other authorized person within two months from the date of the service of this notice at *Putia*, the sudder *Cutcheri* of my zemindary and appertaining to zillah *Rajshahye*, and taking a pottah at the rent mentioned in this notice, deliver a kubulyut. If you do not do this within the said period, after its expiration a settlement will be made with others." There is no proof of the former notices mentioned in this document. For all that appears from the evidence this was the first notice served upon the Defendants. Some further correspondence took place, but nothing was settled between the parties, and the Plaintiff filed her plaint in August, 1874. The Defendants insisted that by reason of a long occupation of the lands they had acquired a right of occupancy, and that the Plaintiff had no right to turn them out of possession. In their written statement they say: "The lands in dispute have been held by us in jote right for upwards of twelve years since their formation, and the Plaintiff therefore included the said jote in the pottah of 12th Jeyt, 1272, and realised rent accordingly. The rents of the years 1277, 1278, 1279, and 1280 have been deposited by us in the moonsiff's Court at *Jungipore*. We have acquired the right of occupancy in the Plaintiff's share of the said lands, and possess a legal right to hold and enjoy the same on payment of a rental of Rs.609 4*a*. per year." They claimed, therefore, a right of occupancy acquired, by virtue of the provisions of Act VIII. of 1869 of the *Bengal* Government, or under Act X. of 1859 of the Governor General in Council.

With reference to this claim the Judge of the Court of first

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instance laid down two issues, the 4th and 5th, which are: "Was there a jotedar holding by Defendants of Plaintiff's share antecedent to, independent of, and not merged in the interest conferred by the ijara lease. If there were such a jotedar holding has it ripened into a right of occupancy?" In his judgment he says: "I find that the Defendants had a jotedary tenure antecedent to the ijara lease, and not merged therein; but that this tenure has not been shewn to have been strengthened by the acquisition of a right of occupancy in the lands included therein." As their Lordships understand the learned Judge in this part of his judgment, he held that there was a jotedary holding, but that the Defendants had not gained a right of occupancy which entitled them to hold possession as against the Plaintiff independently of the stipulation in the ijara.

The High Court put their conclusions on the above issues far more clearly. They say: "At any rate it seems an irresistible conclusion that the occupancy of the Defendants in these lands was connected with and arose entirely out of their tenure as ijaradars of the pergunnah. That being so, the case falls under the repeated decisions of this Court, that no farmer or leaseholder can, during the term of his lease, create for himself a subtenure which is to enure after the lease expires to the prejudice of the owner whose *locum tenens* he is during the term of his lease. But even if that were not so, it is impossible to see how the Defendants could have acquired either a right of occupancy or a jotedar right in respect of an undivided share of an estate."

Their Lordships do not concur in the view thus expressed by the High Court, to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate; but they fully concur in the conclusion that the Defendants' holding as ijardars prior to and during the lease of 1865 did not create in them a right of occupancy, and that after the expiration of the lease of 1865 they held over, subject to the terms of that lease.

They are also clearly of opinion that in point of law the agreement contained in the pottah to grant a renewal of the lease did not create or vest in the Defendants a fresh term of years. It merely gave them a right to a renewal of the lease, and to compel the Plaintiff to renew it if she should attempt to turn them out of

possession at the expiration of the term. It also gave the Plaintiff a right to the land, and to let it to others if the Defendants should refuse to accept a pottah and execute a kubulyut within two months after the rent to be paid during the renewed term should have been duly ascertained and fixed. Accordingly, when after the expiration of the lease, and before the Defendants acquired a right of occupancy, the Plaintiff gave them notice that unless they renewed the lease according to the terms which she pointed out, she would settle with others, or in other words that she would turn them out of possession, the Defendants might if they had pleased have required the Plaintiff to perform her agreement, and to grant them a lease upon the terms stipulated; but even if they had done so they could not, in their Lordships' opinion, have compelled her to grant a lease for a longer period than five years. Nothing is said in the ijara as to the duration of the new lease, and a term for a longer period than the original term could not reasonably be implied. The Defendants however took no measures to obtain a renewal of the lease, and at the present moment the period of five years from the expiration of the lease of 1865 has expired. The Judges of the High Court say: "She waited for three years after the expiry of the ijara lease before she gave notice to the Defendants, and allowed the Defendants to occupy at the old rate, which was very much less than what was now demanded. After that she waited for two years more before she brought the present suit; and finally about six or seven years have now elapsed since the termination of the ijara, and the Defendants are still holding at the rate of Rs.609 that which the Plaintiff claims to be worth Rs.4000. Having regard simply to this circumstance, it appears to us that the Defendants had already had the full benefit which they could have derived from the stipulation in the ijara pottah. They could not have required the Plaintiff to give them the land for more than five years, nor could they have expected to hold the land at anything like so favourable a rent as that at which they have been so long enjoying." Their Lordships are of opinion that the Plaintiff had no right to measure the lands in the absence of the Defendants, or herself to determine finally the rent at which the lease should be renewed. If the rent at which the Plaintiff offered to renew the lease were too high, the

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Defendants were not bound to accept it; but in that case it lay upon them to take measures to compel the Plaintiff to renew at a proper rate, having regard to the stipulations of the lease. This they did not do at any time before the commencement of the suit otherwise than by stating in the letter of the 4th of November, 1873, their readiness to accept a renewal at a rent to be fixed in accordance with the terms stipulated. Even in their defence to the suit, though they stated that they were ready to take a pottah upon the terms stipulated, they still, as already stated, set up a right of occupancy at the rent of Rs.609. 4*a.* a year. It appears that a great portion of the land has been diluviated, and it would be impossible now to measure the land as it existed at the time of the expiration of the lease, or to ascertain what were the productive powers of the land at that time.

Their Lordships are of opinion that the Plaintiff had a right to turn the Defendants out of possession at the expiration of the term granted by the lease of 1865, except so far as that right was qualified by the stipulation for a renewal; that the Defendants at the expiration of that lease had an equitable right to a renewal according to the stipulations in the agreement; but that it is too late for them to rely upon their title to a renewal of the lease which, if it had been granted, would now have expired. They have, therefore, no equity to resist the Plaintiff's claim to recover the possession of the land.

Under these circumstances their Lordships are of opinion that the decree of the High Court ought to be affirmed, and they will humbly advise Her Majesty to that effect. The Appellants must pay the costs of this appeal.

Solicitors for the Appellants: *Freshfields & Williams.*
Solicitor for the Respondent: *T. L. Wilson.*

MAHARAJAH PERTAB NARAIN SINGH .. APPELLANT; J. C.*

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MAHARANEE SUBHAO KOER AND OTHERS RESPONDENTS. *May* 18, 31.

Ex parte TRILOKINATH.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF FYZABAD, OUDH.

Practice—Petition—Appeal heard ex parte—Re-hearing.

A Respondent, who has been properly made a party to a suit in the Courts below and bound by the proceedings therein, but who has not entered an appearance as Respondent to the appeal, or ordered any person to do so for him (the Appellant having failed to take the usual steps either to compel his appearance or to have the appeal regularly heard *ex parte* against him) is not entitled to have a re-hearing of the appeal, unless by some accident, without any default on his part, the appeal has been inadvertently disposed of, as if he had been heard.

Rajundernarain Rae v. *Bijai Govind Singh* (1), and *Ex parte Kistonauth Roy* (2), approved.

Where it appeared that a Respondent had full knowledge of the pendency of the appeal, and had furnished the funds for defending it in the name of another Respondent thereto, a re-hearing was refused.

An issue whether or not such Respondent had been properly made a party to the suit in the Courts below, and whether or not the proceedings in *India*, so far as he was concerned, were *coram non judice*, can only be tried in a new suit in the Courts below; and *quære*, whether in such suit he would be barred by an Order in Council, if made on appeal from a decree by which he was not bound.

THIS was a petition by the above-named *Trilokinath* praying that the above-named appeal might be re-heard in such manner and upon such terms as to Her Majesty might seem fit and the justice of the case require; and also that, with a view to such re-hearing, the suit in which the appeal arose might be remanded to

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH and SIR ROBERT P. COLLIER.

(1) 1 Moore's P. C. Cases, 117; S. C. 2 Moore's Ind. Ap. Ca. 214.
(2) Law Rep. 2 P. C. 274.

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India for evidence to be taken in the Petitioner's presence as a party to the suit, and that the Petitioner might have leave to adduce therein such evidence as he might be advised, or that the order already made by Her Majesty in Council in the above-mentioned appeal might be amended by reserving a right to the Petitioner of coming in and contesting the same within a time to be limited for that purpose, and that in the meantime such order should in no way prejudice or affect the Petitioner's interest in the subject-matter of the suit; and that he might be declared to be in no way barred thereby from asserting his rights to the property of the deceased Maharajah Sir *Man Singh*, or that such further or other order might be made as the circumstances of the case might require and to Her Majesty in Council might seem proper.

The facts of the case sufficiently appear in the judgment of their Lordships.

Sir *James Stephen*, Q.C., *Doyne*, and *Ross*, for the Petitioner *Trilokinath*.

Leith, Q.C., and *Graham*, for the Appellant.

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The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This application seems to involve two distinct questions:—

1st. Whether the Petitioner, if assumed to have been properly made a party to the suit in the Courts below, and bound by the proceedings therein, is entitled to have a re-hearing of the appeal by reason of his not having entered an appearance as Respondent to the appeal, or authorized any person to do so for him; and of the Appellant having failed to take the usual steps against him in order either to compel his appearance, or to have the appeal regularly heard *ex parte* against him.

2ndly. Whether, under the circumstances stated in the petition, he ought not to be treated as a person not properly represented in the suit in the Courts below, and therefore not bound by the proceedings therein; and if so, whether he is entitled to have the order of Her Majesty in Council varied so as to prevent its being

used against him as a bar to any proceedings which he might otherwise be entitled to take in the Courts of *India*.

The first question must, their Lordships think, be answered in the negative. The jealousy with which this tribunal regards any attempt to question the finality of one of its judgments, particularly after its confirmation by an Order in Council; the very rare instances in which such an order has been allowed to be reopened or varied; and the peculiar grounds upon which, if at all, this can be permitted, are elaborately considered in Lord *Brougham's* judgment in the case of *Rajundernarain Rae* v. *Bijai Govind Singh* (1); and in the more recent case of *Ex parte Kistonauth Roy* (2). It results from these authorities that the thing cannot be done unless by some accident, without any blame, and without any default on the part of the party himself, he has not been heard, and an order has been inadvertently made as if he had been heard.

Now, what are the facts in this case as regards the proceedings on the appeal here. The Appellant, who has been successful here, brought his suit in the proper Court of *Oudh* for a declaration of his title as the successor of taluqdari estates of the late Maharajah *Man Singh* (not praying for a decree of possession) against the Maharanee and widow of *Man Singh*, the Petitioner, then an infant, as represented by *Luchmi Nath*, his brother and guardian, and two other parties (one being *Luchmi Nath* in his own right), who, for the present purpose, may be left out of consideration. The Court of first instance dismissed the Plaintiff's claim, and that decree was affirmed by the Appellate Court, with only a variation as to the costs of the suit, which the Appellate Court directed to be paid to all parties out of the estate, instead of leaving each party to bear his own costs. In the hearing of both decrees the Petitioner is named as one of the Defendants; in the lower Court as an infant, appearing by his guardian *Luchmi Nath*; in the Appellate Court as an ordinary Defendant.

The crucial question in the cause was, whether an instrument in the nature of a will executed by the late Maharajah on the 22nd of April, 1862, and under which his widow had executed an

(1) 1 Moore's P. C. Cases, 117; S. C. 2 Moore's Ind. Ap. Ca. 214.

(2) Law Rep. 2 P. C. 274; S. C. 6 Moore's P. C. (N.S.) 360.

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appointment in favour of the Petitioner, had been revoked by the Maharajah in his lifetime.

This tribunal decided (1) this question in favour of the Plaintiff (Appellant), reversing the decrees of both the Courts below, and substituting a declaration of the title of the Appellant as heir to the Maharajah under clause 4 of sect. 22 of Act I. of 1869. The report to Her Majesty was made after a full hearing, on the assumption that the Petitioner, as well as the Maharanee, was represented by the counsel who appeared as for the Respondents on the appeal; and the Order in Council made in pursuance of it is, on the face of it, a final adjudication against both in favour of the Appellant's title.

It is now said, however, that the Petitioner never appeared to, and was not represented on, this appeal; and that the proper steps to have it heard against him *ex parte* were not taken. This case is supported by the affidavit of Mr. *Wilson*, the solicitor, who ostensibly conducted the appeal for the Respondents, who swears that he was retained only for the Maharanee; that he entered an appearance for her alone; that he had no instructions to appear for the Petitioner, and never entered an appearance on his behalf; and that, although the case filed by him was intituled in the same manner as the Appellant's petition of appeal, and was headed, "Case of the above Respondents," this was by a clerical error, which was not discovered by him until it was *recently* (that is presumably after the hearing of the appeal) brought to his notice.

On the other hand, it seems to their Lordships to be established by the affidavits of Mr. *Lattey* and of his clerk, Mr. *Hewett*, by the record itself, and by the bill of costs hereafter mentioned, all taken together, that although Mr. *Wilson* sent to Messrs. *Watkins & Lattey*, the solicitors for the Appellant, a note to this effect, "*Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer*—I have this day entered appearance for the Respondent in the above appeal," Messrs. *Watkins & Lattey*, on the 26th of May following, when they sent the manuscript record to Mr. *Wilson* in the usual

(1) See *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer*, Law Rep. 4 Ind. Ap. 228.

course of business, distinctly asked him by letter whether he appeared for all the Respondents, and received no answer to that inquiry; that afterwards, and in the month of November, 1876, when a clerk of Mr. *Wilson's* and Mr. *Hewitt*, on behalf of Messrs. *Watkins & Lattey*, met at the Council Office for the examination of the printed record, the former indorsed his own, and allowed the Appellant's proof of the record to be indorsed, "*T. L. Wilson*, for the Respondents;" that the record as finally printed bears that indorsement; that Mr. *Wilson*, in May and June, 1877, was served with orders calling upon him to bring in the printed cases of all the Respondents; that he made no objection to the form of such orders, but ultimately brought in the printed case, headed as the case of "the above-named Respondents;" that he thus induced his opponents and this Committee, on the hearing of the appeal, to believe that he was acting for all the Respondents; and that after their Lordships had pronounced their decision, which, amongst other things, directed the costs of all parties to the appeal to be taxed, with a view to the payment of them out of the estate, he brought in before the registrar a bill of costs, which was not only headed as the bill of costs of all the Respondents, but contained items of charge relating to the correspondence between himself and the Petitioner in *India* with reference to the appeal.

Their Lordships must remark that if the case stood here, they would, upon these facts, have serious ground of complaint against Mr. *Wilson*, whose conduct of the case of his admitted client, if he really had no authority to represent the Petitioner, was such as to mislead not only his opponents, but their Lordships. They cannot admit his explanation that the heading of the case was a mere clerical error, and that in fact he was acting, and purporting to act, for the Maharanee alone. Whatever may have been his personal knowledge of these proceedings, he must be held to be responsible for the acts of his clerks, and cannot be acquitted of, to say the least, gross carelessness in allowing the appeal to be conducted as he says it was.

The case, however, does not rest on Mr. *Wilson's* conduct of the appeal. The Petitioner has himself filed an affidavit, from which

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it appears that in May, 1875, after the decree of the Appellate Court in *India*, but whilst the appeal to Her Majesty was pending, the Maharanee executed a further appointment in his favour, by which she relinquished the life interest which she had reserved by the former instrument; that he, being then of full age, though a minor when the suit was commenced, was put into possession of the property; and in 1877 corresponded directly with Mr. *Wilson* touching the appeal, in which, in fact, he had become the sole person interested, and furnished the funds for defending it, at all events in the name of the Maharanee. He had, therefore, full knowledge of the pendency of the appeal; and unless he was content, as he might well be, since their title was almost identical, to defend it in the name of the Maharanee, he might have taken, and ought to have taken, the necessary steps to appear by separate counsel in order to defend his interests. It seems, then, to their Lordships, that this is not a case in which, according to the principles laid down in the cases above referred to, the order of Her Majesty can be re-opened or varied, on the mere ground that he was not properly represented upon the appeal, or cited to appear to it. It cannot be said that there has been no default on the part of the Petitioner.

He asserts, however, that he was never properly made a party to the suit in the Courts below, and that the proceedings in *India*, so far as he is concerned, were *coram non judice*. He alleges that his brother *Luchmi Nath* was not his guardian; that the objection was taken in an early stage of the suit; that *Luchmi Nath* was then dismissed from the suit, not only as a Defendant in his own capacity, but also as the supposed guardian of his infant brother; that no guardian *ad litem* was ever appointed in his place; that whatever part *Luchmi Nath* afterwards took in the management of the suit, he took as agent on behalf of the Maharanee alone; that he, the Petitioner, was never properly represented in the suit, was never duly served with process therein, and that if his name was retained in the title of the cause, it was so retained irregularly and improperly. If these facts can be established, it may be that the final decree in the suit, *i.e.*, the declaration of the Plaintiff's title, considered independently of the Order in Council, and merely

as a decree of the Indian Courts, would not be *res judicata* against the Petitioner. But it is clear that that issue can only be properly tried in a new suit in *India*. And there is the more reason for trying the question in *India*, since what the Petitioner desires is not a mere re-hearing of the cause on the evidence as it stands, which would probably be of little advantage to him, but a re-trial of it on fresh evidence.

It is, however, said, that in such a suit in *India* the Order in Council might be opposed to him as a fatal bar. It would, however, be open to the Petitioner to contend that it was not such a bar, if he should succeed in shewing that he was not bound by the decree against which the appeal was preferred. Their Lordships do not wish to prejudge that question, as they would prejudge it if upon this application they were to recommend Her Majesty to vary the Order in Council. Should a new suit ever be brought, the determination of the Indian Courts upon that, as upon any other question raised in such suit, will be subject to appeal. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss this petition with costs.

Solicitor for Petitioner: *F. Barrow.*
Solicitors for Appellant: *Watkins & Lattey.*

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HER MAJESTY THE QUEEN . . . . . APPELLANT;

AND

BURAH . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Powers of Legislature—Indian Councils' Act, 1861, s. 22—*Indian High Courts Act*, 1861—*Conditional Legislation—Act XXII. of* 1869.

Act No. XXII. of 1869 of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the *Indian High Courts Act* (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council.

The 9th section of that Act, which confers upon the Lieutenant-Governor of *Bengal* the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power.

Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend.

APPEAL from a judgment of a full bench of the High Court (March 26, 1877).

The Respondent *Burah* and one *Book Singh*, since deceased, were tried by the Deputy-Commissioner of the *Khasi* and *Jaintia Hills*, in the *East Indies*, on a charge of murder of one *Kana Lalung*, committed near *Yeothymmai*, in the territory known and defined as the *Jaintia* and *Khasi Hills*, and sentenced to the punishment of death, but the sentence was afterwards, on the 23rd of April, 1876, commuted by the Chief Commissioner of *Assam* to transportation for life.

On the 9th of July, 1876, the officer in charge of the *Kamroop Jail*, where the said *Burah* and *Book Singh* were in confinement as prisoners under the said last-mentioned sentence, forwarded to

* *Present*:—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

the High Court at *Calcutta* petitions of appeal from them, dated the 9th of July, 1876, against the sentence.

The High Court having doubts whether they had jurisdiction over the prisoners referred the question of their power to entertain the petitions to a Full Bench of the said Court.

The question was argued before a Full Bench on two occasions, and the majority of the High Court, on the 26th of March, 1877, decided that the said Court had such jurisdiction, and that the record of the case ought to be sent for in order to the admission of the appeal, and the said Court passed judgment and ordered the same accordingly.

By Act XXII. of 1869 of the Council of the Governor-General of *India* in Council for making laws and regulations, which is entitled "An Act to remove the *Garo Hills* from the jurisdiction of the tribunals established under the General Regulations and Acts, and for other purposes," it is, among other things, provided as follows:—

Sect. 2. "This Act shall come into operation on such day as the Lieutenant-Governor of *Bengal* shall by notification in the *Calcutta Gazette* direct.

Sect. 3. "On and after such day, Act No. VI. of 1835 (so far as it relates to the *Khasi Hills*, therein termed '*Cossyah*' *Hills*), and the *Bengal* Regulation X. of 1822, shall be repealed: Provided that such repeal shall not affect any settlement of land revenue or other matters made under the latter enactment with zemindars or other persons in any place to which this Act applies.

Sect. 4. "Save as hereinafter provided, the territory known as the *Garo Hills*, bounded on the north and west by the district of *Gawalpara*, on the south by the district of *Mymensingh*, as defined by the Revenue Survey, and on the east by the *Khasi Hills*, is hereby removed from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue constituted by the Regulations of the *Bengal* Code and the Acts passed by any Legislature now or heretofore established in *British India*, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid. And no Act hereafter passed by the Council of the Governor-General for making laws

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and regulations shall be deemed to extend to any part of the said territory, unless the same be specially named therein.

Sect. 5. "The administration of civil and criminal justice, and the superintendence of the settlement and realization of the public revenue, and of all matters relating to rent, within the said territory, are hereby vested in such officers as the said Lieutenant-Governor may, for the purpose of tribunals of first instance or of reference and appeal, from time to time appoint. The officers so appointed shall, in the matter of the administration and superintendence aforesaid, be subject to the direction and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue.

Sect. 8. "The said Lieutenant-Governor may from time to time, by notification in the *Calcutta Gazette*, extend to the said territory any law, or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation.

Sect. 9. "The said Lieutenant-Governor may from time to time, by notification in the *Calcutta Gazette*, extend *mutatis mutandis* all or any of the provisions contained in the other sections of this Act to the *Jaintia Hills*, the *Naga Hills*, and to such portion of the *Khasi Hills* as for the time being forms part of *British India*.

"Every such notification shall specify the boundaries of the territories to which it applies."

Under the provisions of the said Act, No. XXII. of 1869, the Lieutenant-Governor of *Bengal*, on the 14th of October, 1871, issued a notification, which was published in the *Calcutta Gazette*, and thereby in exercise of the powers conferred upon him by sect. 9, he extended the provisions of the said Act to the territory known as the *Khasi* and *Jaintia Hills*, and excluded therefrom the jurisdiction of the Courts of Civil and Criminal Judicature, and specified in the notification the bounda-

ries of the said territory. The following is a copy of the notification:—

Notification.

"The 14th of October, 1871, under sect. 9 of Act XXII. of 1869, the Lieutenant-Governor is pleased to extend all the provisions of that Act to the district of the *Khasi* and *Jaintia Hills*, bounded as follows:—

"By the districts of *Kamroop* and *Nowgong* on the north.

"The districts of *Naga Hills* and *Cachar* on the east.

"The *Gáro Hills* on the west.

"The districts of *Sylhet* and *Cachar* on the south.

"The chief political and revenue control of the aforesaid district, and the administration of civil and criminal justice, are vested in the Commissioner of *Assam*, subject to the general direction and control of the Lieutenant-Governor.

"The Commissioner will exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the said district, provided that no sentence of death shall be carried out without the sanction of the Lieutenant-Governor, and that it shall be competent to the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him may seem fit.

"The Deputy Commissioner of the district, and his assistants the native chiefs and officers, and the subordinate officers of Government, will exercise the same powers as they have hitherto exercised, until otherwise directed. No case not now triable in the ordinary British Courts shall by this notification be made triable therein. In respect of cases hitherto triable in those Courts, the officers shall be guided by the spirit of the laws prevailing in *British India* and heretofore in force in the district.

"(Signed) *S. C. Bayley*,
"Officiating Secretary to
the Government of *Bengal*."

The said High Court, for reasons assigned in separate judgments of Mr. Justice *Markby* and three other Judges, forming the majority of the said Court (*Garth*, C.J., *Macpherson* and *Pontifex*, JJ., dissenting), decided (March 26, 1877) that the notification of the

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Lieutenant-Governor of *Bengal* had no legal force or effect in removing the said territory from the jurisdiction which the High Court had previously possessed over it, inasmuch as the Council of the Governor-General of *India* in Council for making laws and regulations had under its constitution, by the *Councils Act*, 1861, no power to delegate such authority to the Lieutenant-Governor as it had by the Act XXII. of 1869 in fact purported to delegate. Accordingly they decided that the High Court had jurisdiction to entertain the defence of the before-mentioned prisoners, notwithstanding the provisions of Act XXII. of 1869. Thereafter, on the 10th of October, 1877, the petitions of appeal came on for hearing before a Division Bench of the High Court, and on such hearing were dismissed.

The Government of *India*, on behalf of the Crown, being dissatisfied with the judgment and order of the Full Bench, dated March 26, 1877, a petition was presented to Her Majesty in Council by the officiating Advocate-General of *Bengal* praying for special leave to appeal therefrom to Her Majesty in Council; and on the 11th of July, 1877, such special leave was granted.

By the statute 24 & 25 Vict. c. 67 (the *Indian Councils Act*, 1861), the power given to the Governor-General in Council at meetings for the purpose of making laws and regulations is conferred by the 22nd section, which is as follows:—

Sect. 22. "The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of *India* within the dominions of princes and states in alliance with Her Majesty; and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in any wise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of *Fort St. George*

and *Bombay*, respectively, in Council, or the Governor or Lieutenant-Governor in Council of any presidency or other territory for which a council may be appointed, with power to make laws and regulations, under and by virtue of this Act: provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act:

Or any of the provisions of the Acts of the 3rd and 4th years of King *William* the Fourth, chapter 85, and of the 16th and 17th years of Her Majesty, chapter 95, and of the 17th and 18th years of Her Majesty, chapter 77, which, after the passing of this Act, shall remain in force:

Or any provisions of the Act of the 21st and 22nd years of Her Majesty, chapter 106, entitled 'An Act for the better government of *India*,' or of the Act of the 22nd and 23rd years of Her Majesty, chapter 41, to amend the same:

Or of any Act enabling the Secretary of State in Council to raise money in the *United Kingdom* for the Government of *India*:

Or of the Acts for punishing mutiny and desertion in Her Majesty's Army, or in Her Majesty's Indian Forces respectively, but subject to the provisions contained in the Act of the 3rd and 4th years of King *William* the Fourth, chapter 85, section 73, respecting the Indian Articles of War:

Or any provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof:

Or which may affect the authority of Parliament or the constitution and rights of the *East India* Company, or any part of the unwritten laws or Constitution of the United Kingdom of *Great Britain* and *Ireland* whereon may depend in any degree the allegiance of any person to the Crown of the *United Kingdom*, or the sovereignty or dominion of the Crown over any part of the said territories."

Sir *James Stephen*, Q.C., and *Graham*, for the Appellant, said that the main question was whether sect. 9 of Act XXII. of 1869

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was within the legislative capacity of the Council; for, assuming the validity of that section, no objection had been raised to the notification. The three questions raised by the judgments of the Court below were, first, whether the Legislature had the power to remove the district in question from the jurisdiction of the High Court; second, whether it had the power to do so in the manner prescribed by Act XXII. of 1869, sect. 9; third, whether it is *ultrà vires* of the High Court to question the validity of an Indian Legislative Act.

As respects the first of these questions, it was pointed out that all the Judges were in favour of the existence of such legislative authority; and as regards the third question, they disclaimed that contention, and conceded that the High Court had such power.

With regard to the existence of such legislative authority, reference was made to 3 & 4 Will. 4, c. 85, s. 43; 24 & 25 Vict. c. 67, s. 22; 24 & 25 Vict. c. 104, ss. 9, 11, 13; and to *The Queen* v. *Meares* (1). By sects. 9, 11, and 13 of c. 104, it was intended to preserve to the Governor-General in Council certain legislative powers which otherwise, by reason of the provision in sect. 22 of c. 67, the Governor-General in Council would not have had. The matters covered by those sections are matters relating to the High Court in respect of which the Governor-General in Council was intended to have legislative powers. See, too, *The Queen* v. *Reay* (2). Act XXII. of 1870 gave validity retrospectively to all the provincial Acts which were open to the objections there taken. It asserts the power of the Governor-General in Council to interfere with the charters of the High Court. Reference was also made to 34 & 35 Vict. c. 35, s. 3, reciting Act XXII. of 1870 of the Governor-General's Council; *Feda Hossein's Petition* (3). See also *High Courts Act, i.e.* c. 104, s. 17, which prolongs the power of issuing letters patent for three years, and clause 44 of the Letters Patent of 1865.

The next question was whether the Legislature had power to affect the jurisdiction of the High Court by the mode provided in sect. 9 of Act XXII. of 1869. The powers of the Indian Legisla-

(1) 14 R. & R. 106. (2) 7 Bomb. H. C. R. Cr. Ca. 77.
(3) Ind. L. R. 1 Calc. 431.

ture are as great as those of the Canadian, and see 30 & 31 Vict. c. 3 (*Canada*), s. 91; which establishes the Parliament of *Canada*. Compare 3 & 4 Will. 4, c. 85, s. 45. [LORD SELBORNE:—Is it contended that the Legislature may not render its enactment dependent for its coming into operation on the act of the executive?] That is the main contention on the other side. The powers given to the Lieutenant-Governor are within the limits of the legislative authority to confer; see Act XXII. of 1869, sects. 5 and 8. For instances of conferred discretion, see Act XI. of 1857; Act XVI. of 1857; Act XXIII. of 1861, sect. 39; Act VIII. of 1859, sect. 385; Act XIV. of 1859, sect. 24. The Legislature frequently delegates authority to say when the Act is to come into force, within what limits it is to be applied, and to make rules and orders. For instances of delegation of authority by Parliament to the Governor-General, see 22 & 23 Vict. c. 27; 28 Vict. c. 15, sects 3 and 5; 28 Vict. c. 18; 33 Vict. c. 3; 24 & 25 Vict. c. 67, sects. 44, 46, and 47. It would be a serious thing to interfere with the exercise of such delegated authority as being *ultrà vires* the legislative authority to confer. It has been frequently exercised in the colonies as well as in *India*: see Act III. of 1865 (*Cape of Good Hope*), sect. 12.

J. B. Norton and *Raikes* (*Eardley Norton* with them), for the Respondent, said that the Judges of the High Court seemed to have been unanimously of opinion that the Indian Legislature could legally remove districts from the jurisdiction of the High Court, and also that it was open to the High Court to try the validity of a law made by the Indian Legislature. The real question upon which difference of opinion existed was whether the Indian Legislature, by the particular means it had adopted in this case, effectually and legally carried out the object it had in view. They contended that the jurisdiction of the High Court as established by Parliament, could not be wholly abolished by any authority in *India*. Reference was made to the *Indian Councils' Act*, 24 & 25 Vict. c. 67, sect. 22. It was never intended to grant such power as is now claimed. According to the true construction of the above section it is not granted, but it is by necessary implication excluded. Compare that

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section with 3 & 4 Will. 4, c. 85, s. 43. There is a significant and intentional omission in sect. 22, which in other respects is *totidem verbis*. Under sect. 43 of the former Act the Governor-General could legislate for all Courts whether by charter or otherwise, and for their jurisdiction. In 1861 the *High Courts Act*, 24 & 25 Vict. c. 104, and the *Councils' Act*, c. 67, were passed within six days of each other to carry out one and the same scheme. Jurisdiction was provided for under c. 104, and power to legislate in reference to the High Court was expressly reserved to Parliament by sects. 9, 11, and 13 of c. 104. No argument therefore can be drawn from c. 67, in favour of such legislative authority residing in the Indian Legislative Councils under that Act. Sect. 18 deals with territorial jurisdiction, and that is repealed by 28 & 29 Vict. c. 15, s. 2.

Next, assuming that the Indian Legislature has the power which is claimed for it, it has not adopted the proper method. If the jurisdiction of the High Court can be abolished by that Legislature, it must be by an Act passed by the Governor-General in Council, in conformity with the powers conferred on him in that respect by the Imperial Parliament. No such Act could delegate any legislative authority or power enabling the Lieutenant-Governor of *Bengal*, if he so pleased, to abolish the jurisdiction of the High Court. No such power of delegation was given, either expressly or by necessary implication, from the terms of the *Indian Councils' Act*. The notification of the 14th of October, 1871, was a nullity and of no legal effect. Reference was made to *Doyle* v. *Falconer* (1); and for American authorities to *Barto* v. *Himrod* (2); *Parker* v. *Commonwealth* (3); *Thorne* v. *Cramer* (4); *Bradley* v. *Baxter* (5). Parliament has constituted the legal machinery for making laws, nominating qualified persons, and regulating the method, time, and place by and in which Acts are to be passed, and has jealously guarded the degree in which any departure from their provisions may be effected, whenever such departure is permitted. Reference was made to 3 & 4 Will. 4, c. 85, s. 43, repealed by 24 & 25 Vict. c. 67, s. 40; Ibid. s. 70; 16 & 17 Vict.

(1) Law Rep. 1 P. C. 328.
(2) 4 Selden, N. York Rep. 483.
(3) 6 Barr. (Pennsylvania Rep.) 507.
(4) 15 Barb. (N. York Rep.) 112.
(5) 15 Barb. 122.

c. 95, s. 22; 17 & 18 Vict. c. 77, s. 3; 24 & 25 Vict. c. 67, ss. 10, 14, 21, 22, 23, 25; 33 Vict. c. 3.

Lastly, it was contended that the question of the legislative capacity of the Governor-General's Council to affect the jurisdiction of the High Court did not arise in this case, inasmuch as by the true construction of Act XXII. of 1869 the jurisdiction of that Court as to the *Garo Hills* was not excluded. The Council had not assumed to exercise the legislative authority contended for, and still less to delegate its exercise in reference to the *Khasi* and *Jaintia Hills*. The nature of this contention sufficiently appears in their Lordships' judgment.

Sir *James Stephen*, Q.C., replied.

The judgment of their Lordships was delivered by

LORD SELBORNE:—

This appeal has been brought under the following circumstances:—

In the year 1869 the Indian Legislature passed an Act (No. XXII. of 1869), purporting, first, to remove a district called the *Garo Hills* from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue, constituted by the regulations of the *Bengal* Code and the Acts passed by any Legislature then or theretofore established in *British India*, and from the law prescribed for such Courts and offices by such Regulations and Acts; and, secondly, to vest the administration of civil and criminal justice, within the same territory, in such officers as the Lieutenant-Governor of *Bengal* might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of *Bengal* should, by notification in the *Calcutta Gazette*, direct. By the 9th section the Lieutenant-Governor was empowered "from time to time, by notification in the *Calcutta Gazette*," to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections to the *Jaintia Hills*, the *Naga Hills*, and such portion of the *Khasi Hills* as might, for the time being, form part of *British India*," being,

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as their Lordships understand, a mountainous district, conterminous towards the east with the *Garo Hills*.

The Lieutenant-Governor of *Bengal*, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the *Garo Hills;* and afterwards, by another notification published in the *Calcutta Gazette* on the 14th of October, 1871, he extended all its provisions to the district of the *Khasi* and *Jaintia Hills*, declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of *Assam*, subject to the general direction and control of the Lieutenant-Governor; and adding, that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district; provided, that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

Under this Act, and these notifications, one *Burah* (the Respondent here) and another person, since deceased, were in the year 1876 tried by the Deputy Commissioner of the *Khasi* and *Jaintia Hills* upon a charge of murder committed within that hill territory. They were convicted and sentenced to death, but on the 23rd of April, 1876, the sentence was commuted by the Chief Commissioner of *Assam* to transportation for life. On the 9th of July, 1876, they presented a petition of appeal to the High Court at *Calcutta;* and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the case fell within their appellate jurisdiction; and they sent for the record of the proceedings with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that the 9th section of the Act of 1869, purporting to authorize the Lieutenant-Governor of *Bengal* to extend

the Act of 1869 to the *Khasi* and *Jaintia Hills*, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, viz. (1), that the Act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the *Garo Hills*, and, therefore, could not do so as to the *Khasi* and *Jaintia Hills*, assuming them to have been brought within its operation; and (2), that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not sect. 9 only, was void, and *ultrà vires* of the Indian Legislature. The latter of these arguments had been urged unsuccessfully before the High Court at *Calcutta;* but the former was not presented to that Court, and was first suggested, at the hearing before their Lordships, by the junior counsel for the Respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition, that the 4th section of Act XXII. of 1869 purports to remove the *Garo Hills*, not from the jurisdiction of the High Court, established by Her Majesty's letters patent under the authority of Imperial Statutes, but only from that of the local Courts, constituted by the regulations of the *Bengal* or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those local Courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of *Bengal*) substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Judicature," mentioned in the 4th section of the Act of 1869, were only the Courts of original jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible that under the terms of the 8th and 9th sections of the *High Courts Act* (24 & 25 Vict. c. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December, 1865), under which the *Calcutta* High Court is constituted, appeals might have gone to that Court from criminal tribunals of first instance, established by the Lieutenant-Governor of *Bengal* in the *Garo*, or

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the *Khasi* and *Jaintia Hills*, if Act XXII. of 1869 had made no other provision for such appeals. But the 5th section of that Act distinctly authorized the Lieutenant-Governor to appoint tribunals, not of first instance only, but also of "Reference and Appeal;" and, by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of *Assam*, with an ultimate controlling authority to himself. Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

The next question is, whether the whole Act of 1869 is void? It is said to be so, because the jurisdiction of the High Court was established by the Act of the Imperial Parliament already referred to (24 & 25 Vict. c. 104), which passed in the same session with the *Indian Councils' Act;* and because, by sect. 22 of the *Indian Councils' Act* (24 & 25 Vict. c. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places or things whatever within the said territories," is qualified by certain conditions; one of which is, "that the Governor-General shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof." None of the other conditions expressed in the Act apply to this case.

The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 & 25 Vict. c. 104?

Now, it appears to their Lordships, from the express terms of the Act 24 & 25 Vict. c. 104, that (unless there should be anything to the contrary in the letters patent under which the High Court is established) the exercise of jurisdiction in any part of

Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

By the 1st section of that Act, Her Majesty was authorized, by letters patent, "to erect and establish a High Court of Judicature for the *Bengal* division of the Presidency of *Fort William*," and others at *Madras* and *Bombay*. The next six sections relate to the qualifications, tenure of office, and emoluments, &c., of the Judges of such Courts. The 8th section abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 & 29 Vict. c. 15). But, as some argument was founded on the 18th, it may be fit here to observe, that, by that section, Her Majesty was empowered to make Orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts;" and that the same power was, in substance, conferred upon the Governor-General of *India* in Council (not in his legislative, but in his executive capacity) by the repealing Act of 1865.

The 9th section of 24 & 25 Vict. c. 104, expressly says, that each of the High Courts shall, within its own presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by her letters patent, grant and direct;" and that, "save as by such letters patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council," the High Court in each presidency shall have all the jurisdiction of the former Supreme and Sudder Courts, abolished by sect. 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's letters patent) is here distinctly recognised.

The 11th section is similar in effect. It enacts that, after the

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establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of *India*, which had been applicable to the Supreme Courts of *Bengal*, *Madras*, and *Bombay*, shall be applicable to the High Courts, as far as may be consistent with that Act itself, and the letters patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of *India* in Council." The 12th section contains nothing of importance to the present question.

The Act of 1865 (under which the *Calcutta* letters patent of the 28th of December, 1865, were actually issued) concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the letters patent of the 28th of December, 1865 (clause 44), it is "ordained and declared that all the provisions of these our letters patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

So far, therefore, from being in contravention of any of the provisions of the statute 24 & 25 Vict. c. 104, or of the letters patent issued under that statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council as might remove any place or territory from the jurisdiction of the High Court at *Calcutta* is expressly contemplated and authorized both by those statutes and by the letters patent themselves. Their Lordships, under these circumstances, agree with the High Court, that Act No. XXII. of 1869 was, in its general scope, within the legislative power of the Governor-General in Council: and they are therefore brought to the consideration of the more limited question, whether, consistently with that view, the 9th section of that Act ought nevertheless to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice *Markby*, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be

regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of *Bengal* by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *à fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers

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were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in *India*, and arm with general legislative authority, a new legislative power, not created or authorized by the *Councils' Act*. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of *Bengal;* leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, "in the other territories subject to his government." The Legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the *Garo Hills*, what was done as to the *Khasi* and *Jaintia Hills?* The Legislature decided that it was fit and proper that the adjoining district of the *Khasi* and *Jaintia Hills* should also be removed from the jurisdiction of

the existing Courts, and brought under the same provisions with the *Garo Hills*, not necessarily and at all events, but if and when the Lieutenant-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in *India* are mentioned in the opinions of the Chief Justice of *Bengal*, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII. of 1859, XXIII. of 1861, and XXV. of 1861).

By section 385 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories

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not subject to the general regulations of *Bengal*, *Madras*, and *Bombay*, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity), "or by the Local Government to which such territory is subordinate, and notified in the *Gazette*." Section 445 in the Code of Criminal Procedure is precisely similar. And by sect. 39 of Act XXIII. of 1861, when any such extension as that authorized by section 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation, or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of *India*; great part of which belongs to the period antecedent to the year 1861, and must therefore (as Sir *Richard Garth* well observed) be presumed to have been known to, and in the view of, the Imperial Parliament, when the *Councils' Act* of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.

Solicitor for Appellant and Respondent: *The Solicitor, India Office.*

RAMJISDAS AND IMTIAZ ALI . . . . APPELLANTS;

AND

RAJAH BHAGWAN BAX AND ANOTHER . RESPONDENTS.

J. C.*
1878
May 22, 23; June 22.

ON APPEAL FROM THE COURT OF THE COMMISSIONER, LUCKNOW DIVISION, OUDH.

Oudh Talookdars Relief Act (XXIV. of 1870), s. 10—Appeal allowed though presented after the prescribed Period.

Case in which, having regard to exceptional circumstances and exceptional legislation, an appeal to the Commissioner of Division against a decision of a manager appointed under the *Oudh Talookdars Relief Act*, was *held* to have been rightly allowed, although preferred long after the period of six weeks prescribed by sect. 10. It appeared that the Appellant in the Court below was a minor, and incapable of exercising his right to appeal except through the manager, who himself made the order appealed from, and that the Respondents (present Appellants) had after the expiration of the said six weeks themselves prayed for a judicial determination of substantially the same questions as were raised by the present appeal.

APPEAL preferred from a decision (Feb. 1, 1875) of the Commissioner of the *Lucknow* Division of the province of *Oudh*, reversing the decisions of Mr. *Finn*, as manager of an incumbered estate (Nov. 3, 4, 25, 1872), passed under the provisions of the *Oudh Talookdars Relief Act* (XXIV. of 1870) in favour of the Appellants.

The questions raised by this appeal were, 1, as to the jurisdiction of the Commissioner under sect. 10 of the above Act to entertain the appeal after the lapse of so long a time and under the circumstances of the case; 2, supposing that jurisdiction to exist, whether upon the merits of the case and the law applicable to it the Appellants were not entitled to the larger rate of interest awarded by the manager.

The circumstances of the case and the course of the proceedings sufficiently appear in their Lordships' judgment.

The judgment appealed against was as follows:—

"The first order in this case was passed by Mr. *Glynn*, Deputy Commissioner, on the 4th of September, 1871. This left a sum of

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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Rs.3107. 8*a.* for further inquiry. The next order is dated the 10th of June, 1872, disallowing the claim to the sum of Rs.3107 8*a.*, and directing that after the 4th of September, 1871, interest should be paid at the rate of 6 per cent. per annum.

"The estate was subsequently brought under Act XXIV. of 1870, and the superintendent, Mr. *Finn*, admitted an application for review of the Deputy Commissioner's order, on the ground that the order was given before the estate was brought under the Act.

"The notification bringing the estate under the Act is dated the 30th of October, 1871, therefore the estate was under the Act when the Deputy Commissioner, by his order of the 10th of June, 1872, fixed the rate of interest at 6 per cent per annum, and Mr. *Finn* acted under a misapprehension.

"On the 4th of November, 1872, Mr. *Finn* passed an order directing that Rs.3913 should be added to the claim against Defendant, and interest should be allowed at 18 per cent. per annum to date, and at 6 per cent. per annum on the principal till satisfaction.

"On the 25th of November, 1872, Mr. *Finn* passed an order (based on a decision which was manifestly wrong of the Commissioners, *Lucknow*, in the case of *Mirza Agha Ali Khan* v. *Girdhari Sing*) to the effect that the rate of interest agreed upon should be allowed up to the date of decision, and thereafter 12 per cent. per annum on the amount covered by the bond, and on the remainder of the debt at 6 per cent. per annum.

"These proceedings came, before the Chief Commissioner, who objected in his executive capacity to the award of 12 per cent. per annum interest as clearly illegal, the maximum rate allowable under Rule 8 of the rules framed in accordance with the Act, and which have the force of law, being 6 per cent.

"Under these circumstances the person really interested, *i.e.*, the proprietor of the estate, being a minor, I admitted this appeal for reasons recorded in my order of the 2nd of November last, though the term had long expired.

"Respondent objects that under Act XXIV. of 1870 an appeal cannot be admitted beyond six weeks, and the *General Limitation Act* does not apply. This Act was passed subsequently and does

not apply, but under the former law Act VIII. of 1859, sect. 333, appeals were admissible beyond the term, when sufficient cause was shewn for delay, and in my opinion the circumstances of the case and the minority of the Appellant do afford sufficient cause.

"It is certainly most unusual to admit an appeal after two years, but the case is a very peculiar one, and as a matter of fact the decree appealed from is so manifestly illegal that it cannot be enforced. Rule 8, which has the force of law, prescribes 6 per cent. as the maximum rate of interest awardable, and an award of 12 per cent. is a decree incapable of execution.

"Act XXIV. of 1870 has undoubtedly hit capitalists very hard; still, where the provisions of the law are clear, we have no power to set them aside in their favour.

"Appellant objects to other matters besides the rate of interest, but I decline to go into them now.

"On the 10th of June, 1872, Mr. *Glynn*, Deputy Commissioner, had full power to fix the rate of interest, and he fixed it at 6 per cent.

"Mr. *Finn*, in November, 1872, reversed the Deputy Commissioner's order under a misapprehension, and after the usual term for admitting reviews had expired.

"Mr. *Finn's* order fixing the rate of interest being, as above shewn, clearly illegal, I set it aside and restore that of the Deputy Commissioner, under which Respondent will receive 6 per cent. per annum only.

"The parties will pay their own costs."

Doyne, for the Appellants.

Mayne, for the Respondent, the Superintendent of Incumbered Estates, *Lucknow* Circle.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an appeal from a judgment of the Commissioner of the *Lucknow* Division of the Province of *Oudh*, by which he varied an order made by the Superintendent of Incumbered Estates under the *Oudh Talookdars Relief Act* of 1870.

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To make the judgment and the grounds of appeal from it intelligible a short history of the case is necessary.

On the 3rd of June, 1870, Rajah *Omrao Sing*, talookdar of *Pakra Ausari*, executed a deed whereby he acknowledged that he had received Rs.60,000 from the Appellants, for which sum he pledged his estate to them. They were to hold the estate and receive the rents and profits of it for twelve years, after which time he was to be entitled to repay them the principal and interest at 12 per cent. per annum and to recover possession of the estate.

Soon after another advance of Rs.12,000 was made to the Rajah, and Rs.3000 were advanced to his brother for which he became security. Some other small sums were advanced to him at 18 per cent.

His estate was soon after taken possession of by the Court of Wards on a representation, which turned out to be unfounded, of his incapacity; subsequently on his application the provisions of the *Oudh Talookdars Relief Act* (XXIV. of 1870) were duly applied to the estate.

The order directing the application of the Act to the estate, and appointing a manager, was dated the 30th of October, 1871. Mr. *Glynn*, the Deputy Commissioner of the province, who had been the manager under the Court of Wards, was appointed manager under the Act. In November, 1872, he was succeeded by Mr. *Finn*.

The *Oudh Talookdars Relief Act* appears to have been enacted mainly in the interest of the talookdars, for the purpose of protecting them in some degree against the claims of money-lenders by which their estates were being consumed, and undoubtedly some of its provisions are somewhat stringent against creditors. With its policy, however, we have no concern. The Act, after restraining proceedings in execution against the talookdar and his estate,—invalidating all incumbrances created by him during the management, investing the manager with large powers for protecting and improving the property, and other purposes, and providing for the proof of debts, proceeds to enact as follows:—

"9. The manager shall in accordance with the rules to be made under this Act determine the amount of the debts and liabilities due to the several creditors of the talookdar, and persons holding

mortgages, charges or liens on the said property, or any part thereof.

"10. An appeal against any refusal, admission or determination under sects. 7, 8, or 9, shall lie, if preferred within six weeks from the date of such determination, to the Commissioner of Division to whom the manager is subordinate, and the decision of such Commissioner or of the manager if no such appeal has been so preferred, shall be final.

"11. When the total amount of such debts and liabilities has been finally determined, the manager shall prepare and submit to the Chief Commissioner a schedule of such debts and liabilities, and a scheme for the settlement thereof, and such scheme when approved by the Chief Commissioner shall be carried into effect. Until such approval is given, the Chief Commissioner may, as often as he thinks fit, send back such scheme to the manager for revision, and direct him to make such further inquiry as may be requisite for the proper preparation of the scheme."

Section 20 enables the Chief Commissioner to make rules consistent with the Act in all matters connected with its enforcement, and declares "that such rules when approved by the Governor-General of *India* in Council, and published in the local official *Gazette*, shall have the force of law."

Rules were duly made in pursuance of the Act, of which the 8th is in these terms:—

"When the amount of any debt, both principal and interest, has been determined, the manager may direct that interest, at a rate not exceeding 6 per cent. per annum, shall be paid on the aggregate sum declared to be due from the date of the decision till the date of payment."

The combined effect, therefore, of the Act and of the Rule made under it is that the manager is to determine the amount due for the principal and interest up to the date of his determination, calculating such interest according to the contract rate (if any), and may allow subsequent interest on the amount so determined, as upon a judgment debt, up to the time of payment, provided the rate of such subsequent interest does not exceed 6 per cent.

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Mr. *Glynn* on the 4th of September, 1871, while he was manager under the Court of Wards, made the following memorandum:—

"The claim (of Appellants) for Rs.60,000 + Rs.12,000 will now be registered. There were Rs.3000 let off, and I will not bring them in now against the Rajah after a compromise. About the remaining Rs.3107. 8*a.* inquiry will be made on copies of the claimants' books being received. The Rajah will be referred to also about this money and it will be admitted if no valid reason be shewn against my doing so by the Rajah."

After Mr. *Glynn* was appointed as manager under the Act, the following memoranda were made by him:

"Will not let off more than the Rs.3000. *Imtiaz Ali* will let off 10 per cent. for cash payment on interest.

"27th April, 1872."

"The interest on the Rs.72,000 will be according to the bond up to September, 1871, and after that at 6 per cent. per annum. The claim for Rs.3107 8*a.* in respect to Babu *Quidal Sing* is not admitted. The Babu has his own village, and the Babu should be proceeded against.

"10th June, 1872."

It has been contended on the part of the Respondent that this last memorandum was a "determination" by Mr. *Glynn*, under the 10th section of the Act, and that not having been appealed against within six weeks it became final. Their Lordships, however, do not regard it as such a determination. On the appointment of Mr. *Finn* as manager in November, 1872, the Appellants brought their claim before him, contending, and rightly as it appears to their Lordships, that there had been no final determination by his predecessor, whereupon Mr. *Finn* made an order, which he was induced to alter on review. His order on review, dated the 25th of November, 1872, increased the principal sum, and thus concluded:—

"Interest on the debt to date of decision will be calculated at the rate agreed upon. Future interest upon the sum covered by the bond at 1 per cent. (per mensem), and remainder of the debt at 6 per cent. per annum."

Soon after this order the Rajah died and was succeeded by his infant son, who is a Respondent together with the manager (or superintendent) of the incumbered estates.

After a good deal of delay this order was brought to the attention of the Chief Commissioner, who, acting probably under the powers conferred on him by the 11th section of the Act, appears to have disapproved of so much of it as directed future interest at 12 per cent. per annum, regarding this rate of interest as prohibited by the 8th rule, in which view their Lordships concur. Thereupon (and on the 8th of June, 1874), the following proceeding was recorded by Pundit *Kali Sahae*, described as Superintendent of Incumbered Estates, *Lucknow* Circle:

"A docket No. 1322, dated the 29th of April, 1874, has been received from the personal assistant to the Chief Commissioner under cover of the Commissioner's docket No. 1704, dated the 4th of May, 1874, directing that the superintendent was not authorized to award interest at a higher rate than 6 per cent. Wherefore a higher rate of interest than 6 per cent. will not be allowed.

"Ordered that a letter be addressed to the decree holders, communicating to them the above information. This proceeding will be filed with the record."

On this the Appellants became unable to avail themselves of Mr. *Finn's* order and a deadlock appears to have ensued. The next material proceeding was taken by the present Appellants, who appealed to the Commissioner of the *Lucknow* Division against the foregoing order of *Kali Sahae*. The Division Commissioner referred them to the Chief Commissioner, who declined to interfere in their behalf, whereupon they preferred another appeal to the Division Commissioner, dated the 10th of September, 1874, wherein they contended that Mr. *Finn's* order was right and that it was final. The petition concludes in these terms:

"Under these circumstances your Petitioner most respectfully re-submits his petition of appeal with inclosures, and prays that it may be formally admitted and judicially disposed of to enable any of the parties feeling aggrieved by the decision to prefer his appeal under section 4, Act VI. of 1874, to Her Majesty's Privy Council."

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The present Appellants therefore, in September, 1874, desired a judicial determination on substantially the same questions as are raised in the present appeal.

It does not appear what, if anything, was done upon the appeal of September, 1874, and it may be inferred that the proceedings dropped, or were superseded by those next to be mentioned.

On the 23rd of October, 1874, an appeal raising the same question in another form was presented by the present Respondents against the order of Mr. *Finn*, on the ground (among others) that it was illegal on the face of it in giving a rate of interest prohibited by law. On this appeal the Commissioner ordered that, Mr. *Finn's* calculation of principal being adopted, the interest should be calculated under the terms of the deed up to Mr. *Glynn's* order of the 10th of June, 1872, and thereafter at 6 per cent. per annum.

This is the judgment now appealed against, and the point mainly relied upon is, that the appeal being out of time, the Commissioner had no jurisdiction to entertain it. The Commissioner was aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by the 10th section of the *Oudh Talookdars Relief Act*, and appeared to think that sect. 333 of Act VIII. of 1859 might apply to the case, in which view their Lordships cannot concur. He proceeded to dwell on the exceptional nature of the case, on the fact of the Respondent being a minor and incapable of exercising his right to appeal, except through the manager, who himself made the order, and could scarcely be expected to appeal against it—a state of things which the Act does not seem to contemplate—he referred to the action of the Chief Commissioner, who objected to the allowance of interest beyond the lawful rate, practically setting aside Mr. *Finn's* order, and he might have referred to the appeal of the now Appellants against the order of the 8th of June, 1874, whereby they desired an adjudication on practically the same question as that raised in the appeal before him, expressly with the object of getting rid of the deadlock occasioned by the conflicting decisions in *Oudh* by an appeal to Her Majesty in Council. He finally came to the conclusion that he had power to amend so much of the order as was manifestly at variance with the law. Their Lord-

ships, although the case is not free from difficulty, are not so clearly satisfied that under the exceptional legislation with which they have to deal, and the exceptional circumstances of this case, the Commissioner had not this power to deal with the order of his subordinate officer, as to feel themselves driven to a decision the effect of which would be to reverse an order which appears to them, except in one particular, just and proper, and to set up another which, if acted upon, would practically repeal the 8th rule made under the *Oudh Talookdars Relief Act*. The particular referred to is that the order directs the 6 per cent. interest to commence from the 10th of June, 1872, the date of Mr. *Glynn's* memorandum; whereas in their opinion that date should be the 25th of November following, when the gross amount then due for principal and interest was finally determined by Mr. *Finn*. They will therefore humbly advise Her Majesty that the order appealed against be varied so far as to direct that the amount determined by Mr. *Finn* on the 25th of November, 1872, to be due should be adopted, and that subsequent interest should be allowed thereon at the rate of 6 per cent. per annum. There will be no costs of this appeal.

Agent for the Appellants: *T. L. Wilson.*
Agent for the Respondent: *The Solicitor, India Office.*

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THE ZEMINDAR OF PITTAPURAM . . PLAINTIFF;

AND

THE PROPRIETORS OF THE MUTTA OF KOLANKA . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Res judicata—Act VIII. of 1859, *s.* 2—*Adverse Possession.*

In a suit to recover possession of certain houses and grounds appertaining thereto, it appeared that the property had formed the subject of another suit brought by the Plaintiff against his grandfather's widow and the Defendants' father and aunt in which the Plaintiff's claim to restrain the widow from acts of waste had been dismissed, no claim, however, to the property having then been made by the Plaintiff, nor any allegation made or evidence offered to connect the Defendants' father therewith:—

Held, that the decision in the former suit was not a decision in a suit between the same parties, or parties under whom they claim, establishing the right of the Defendants in the former suit to the property in question in the present suit, and that the cause of action in the present suit was not determined in the former suit.

A plea of limitation in the present suit cannot be sustained without evidence as to the title under which Defendants, or those under whom they claim, held the property in question; whether in their own right or as trespassers, or under an arrangement with the Plaintiff.

APPEAL from a decree of the High Court (July 14, 1876) confirming a decree of the District Court of *Godavery* (Oct. 2, 1875) whereby the Appellant's suit was dismissed. The decision in both Courts rested upon the ground that the suit was *res judicata*.

The suit was brought on the 16th of November, 1874. Its nature and the circumstances of the case sufficiently appear in their Lordships' judgment.

The issues settled in the case were,

1. Whether the houses and sites claimed appertain to the zemindary, and as such are the property of the Plaintiff, the zemindar, or are the property of Defendants;

2. Whether this suit is barred;

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

3. Whether this suit has been properly valued;

4. Whether the Plaintiff is barred under s. 2 of the *Civil Procedure Code* from bringing this suit in respect of all or any of the property now sued for by reason of the cause of action or any part thereof having been previously heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim.

J. B. Norton, and *Mayne* (*Eardley Norton* with them), for the Appellants.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal in a suit brought by the Plaintiff to recover possession of certain houses and grounds appertaining thereto, situate in the fort of *Pittapuram*, which he claimed as part of his zemindary of *Pittapuram*. He stated in his plaint that his father, "*Sri Raja Row* (late) *Venkata Surya Row Bahadur*, and the Defendants' father, *Sri Rajah Row* (late) *Kumara Venkata Row Bahadur*, were brothers, of whom the Plaintiff's father, who was elder, succeeded to the ancient zemindary of *Pittapuram* belonging to their father, *Sri Rajah* (late) *Niladri Row Bahadur*; and after him the Plaintiff became his successor." He further said, "As the Plaintiff's paternal grandmother, *Sri Raja Row* (late) *Bhavayyamma Garu*, was a member of the Plaintiff's family, she lived in some of the houses within the fort of *Pittapuram* belonging to the Plaintiff, and had in her use some grounds appertaining to that fort; and while so she died on the 11th of March, 1870. The Defendants retained the said houses and grounds in their possession even after her death, on the ground of their having occupied them with her until her death; and although the Plaintiff demanded them to surrender them up to the Plaintiff in July, 1870, they have not done so yet; and therefore the cause of action arose in that month."

The Defendants, in their written statement, set up in defence that the claim was barred by the *Statute of Limitations*; and, further, they stated that they were entitled to the property in dispute, and that the Plaintiff had no right to recover the same on the pretext that the property formed a part of his zemindary

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In paragraph 3 they said, "The Plaintiff brought the suit No. 4 of 1862 on the file of the late Civil Court against the Defendant's father, and others, for a decree establishing his right to these houses and other property; and the said suit having been dismissed, he has now again brought this suit for the said houses; and this suit is therefore opposed to sect. 2 of the Code of Civil Procedure." Upon that an issue was raised whether the Plaintiff was barred under sect. 2 of the Civil Procedure Code from bringing the suit by reason of the cause of action or any part thereof having been previously heard and determined by a Court of competent jurisdiction in a former suit between the same parties or parties under whom they claim.

The principal question in this appeal is, whether the right to recover the property in suit was determined in a former suit, and whether, as regards that property, it was a suit between the same parties or parties under whom they claim.

The former suit was brought in 1862 against the widow of *Niladri Row*, the grandfather of the Plaintiff, and also against the father of the Defendants and the sister of their father.

The grounds were, first, that the widow had misappropriated certain moveable property belonging to the estate of her deceased husband *Niladri*, and had with part of the proceeds thereof purchased certain muttas described in No. 1 of the particulars annexed to the plaint, and had alienated the same to the co-Defendants by deed of gift; secondly, that the lands described in No. 2 of the said particulars were sree lands to which she was entitled only for life by way of maintenance, but that she had executed a document transferring them to the co-Defendants as a gift,

There was also another item in the particulars, No. 3, described as "An upstair house situated within the fort of *Pittapuram* belonging to the Plaintiff, and valued at Rs.4000, together with three houses attached thereto, as well as a yard and compound.

There is no doubt as to the fact that the property mentioned in No. 3 is the same property as that which is now sought to be recovered. As regards the properties described as Nos. 1 and 2, the Plaintiff sought, amongst other things, to have the deeds of gift cancelled, to recover possession of No. 1, and for a prohibition against the alienation of property No. 2. As regards the property

described in No. 3, and which was sought to be recovered in the present suit, there was no distinct allegation of fact either in the plaint or in the written statement, nor anything to connect the present Defendants' father therewith, or to disclose any claim thereto on the part of the Plaintiff; and their Lordships have come to the conclusion that substantially the relief sought in respect of it was, as stated by the High Court, to restrain the widow from acts of waste.

As regards Nos. 1 and 2, which are not the subject of the present suit, they had been assigned by the widow to the co-Defendants, who, of course, were interested in them, and necessary parties to the suit; but as regards the houses and other property the subject of the present suit there was no charge that she had ever assigned or that she intended to assign them to the co-Defendants, nor any allegation to shew that the co-Defendants had any interest whatever in them.

As regards that portion of the property, then, to which this suit relates, and as to which the High Court considered the former suit was one to restrain waste, the widow was substantially the only Defendant, and her co-Defendants were no parties to the suit.

No issue was raised nor any evidence offered on either side in respect of that part of the property, either to shew that the plaintiff was entitled to an injunction or for any other purpose, and the Plaintiff's suit was dismissed. The High Court, on appeal, affirmed the judgment. They said: "The judgment must be affirmed with respect to the houses and premises described as No. 3, there being no evidence whatever relating to this head of claim." Under these circumstances their Lordships are of opinion that the decision in the former suit was not a decision in a suit between the same parties or parties under whom they claim establishing the right of the Defendants in the former suit to the property in question in the present suit, and that the cause of action in the present suit was not determined in the former suit.

The issue as to *res judicata*, however, was not the only issue in the present suit; other issues were raised. The first was, "Whether the houses and sites claimed appertain to the zemin-

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dary, and, as such, are the property of the Plaintiff, the zemindar, or are the property of the Defendants." The Judge of the first Court did not determine that issue. He said: "I find in the affirmative on the fourth issue" (that is, the issue as to *res judicata*); "and with the evidence before me, under which I hold the Plaintiff estopped from bringing this suit, I could not but find, were it necessary to record a finding, against the Plaintiff on the first issue." As regards the estoppel, the same principle which applies to *res judicata* must apply to that; the parties were not bound by the estoppel, inasmuch as the former suit was not substantially, as regards the houses and property in the present suit, a suit between the same parties, nor was there in it a claim or a decision as to the right.

There was also another issue, namely, whether the suit is barred by limitation. As regards that issue the Judge of the first Court says: "To sum up, I find that the grandmother of the Defendants, and her son, and afterwards her son's sons, lived together in the premises now sued for as their principal place of residence, not only from 1835, as stated by the Defendants, nor from 1845, as stated by the Plaintiff, but the grandmother and her son lived there from and before the death of *Niladri Row* in 1828, and continuously, with but few breaks or visits at times." There is, however, no express finding as to the title under which the mother remained in possession. If the houses were part of the zemindary which descended to the Plaintiff, it would be important to ascertain whether the mother remained in possession by reason of an agreement or other arrangement by which she was to be allowed to remain there for her life as her place of residence, or whether she continued there as a trespasser holding the property as in her own right. There has been no finding upon that point, and therefore it will be necessary to have it determined. If she held in her own right or as a trespasser, then the *Statute of Limitations* would be a bar, but if she held under an arrangement by which she was allowed to remain there for her life, the occupation during her life would not be a bar to the present suit, inasmuch as she died within the period of limitation.

As regards the first and second issues, therefore, their Lordships think that under all the circumstances the case ought to be

remanded to the High Court to determine them, and this more especially as the Respondents are not present to argue the case upon the evidence.

Under these circumstances their Lordships will humbly advise Her Majesty that the finding upon the fourth issue be set aside, and the decree of the High Court be reversed, and that the case be remitted to the High Court to determine the first and second issues, and to decide the case upon the merits.

The costs of this appeal will be taxed here, and are to be costs in the cause.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Rawle.*

SYUD BAZAYET HOSSEIN AND OTHERS . . DEFENDANTS;

AND

DOOLI CHUND . . . . . PLAINTIFF.

MOULVIE MAHOMED WAJID . . . . DEFENDANT;

AND

SYUD BAZAYET HOSSEIN AND OTHERS . . PLAINTIFFS.

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Nov. 5, 6, 7, 9.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Mahomedan Law— Dower—Alienation by Heir to bonâ fide Purchaser.

A creditor of a deceased Mahomedan whether in respect of dower or otherwise cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law, whether by sale or mortgage.

Mussumut Wahidunnissa v. *Mussumut Shabrattun* (1) approved.

Such alienee is bound by any decree charging the estate passed in a suit against the heir, pending at the date of alienation.

THE first of these appeals was from an order of the High Court passed on special appeal (May 23, 1873), which substantially

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 6 Beng. L. R. 54.

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affirmed a decree of the Judge of *Gya* (March 27, 1872) in favour of the Respondent, who sued for self and as guardian of his minor brothers, heirs of *Greedhur Lall*, the purchaser at a sale in execution of the mouzah in suit.

The facts of the case are stated in the first of the two judgments of their Lordships printed below.

The judgment of the High Court (*Phear* and *Ainslie*, JJ.) was as follows:—

"This seems to be an extremely plain case. One *Khorshed Ali*, a Mahomedan gentleman, died in October, 1865, leaving *Najmooddin*, his son, and three widows as his heir and heiresses. The three widows also had a right to dower.

"In June, 1866, the son *Najmooddin* being in possession, as I understand, substantially of the whole of the deceased's property, mortgaged it under the designation, which we have heard much discussed, of his milkiut mokurruri,—8 annas' share of certain property—to secure the repayment of a sum of money which had been advanced to him by the mortgagee. At that time the widows had not made a specific claim upon *Najmooddin* for their dower. But in the following year, namely, in 1867, they brought a suit against him to assert their right of dower, and they succeeded in getting a decree against him in that suit in June, 1867.

"It appears to me that it is now settled by several decisions that the Mahomedan widow's right to dower against the estate of her deceased husband is generally speaking simply in the situation of a debt which she like any other creditor can take legal measures to enforce against such property of her husband as she can find in the hands of the heirs, or even in the hands of any other persons, provided these have taken as volunteers or with notice of her making a specific claim against that property. No doubt if she is herself in possession of the property she is entitled to assert a lien upon it in respect of her own debt against the other heirs, and to pay herself her own debt before she pays the debt of any one else. But if she is not in possession of the property, and if she is forced to take proceedings in order to liquidate the debt out of her husband's property, she is, until those proceedings have ripened into some act of Court against the property, simply in the position of an ordinary creditor.

"Thus it seems to me that in this case until the widows brought their suit in 1867, the deceased person's property in the hands of *Najmooddin* was not subject to a lien or charge in favour of the three widows. Therefore, when *Najmooddin* pledged the property in June, 1866, so far as his own share as heir in the property was concerned, he was able to pass it free from all incumbrances to a *bonâ fide* purchaser for valuable consideration. It may be that the money for which an heir under such circumstances as these alienes his share, is taken for the purpose of discharging his ancestor's debt, and I do not think that the purchaser is bound to see to the application of the money. It is not contended here that the mortgagee who took by the bond of June, 1866, was not a *bonâ fide* purchaser and did not give valuable consideration. He was therefore entitled, as I think without doubt, to the benefit of this mortgage to the full extent of *Najmooddin's* own share notwithstanding the subsequent proceedings which were taken by the widows to assert their right for dower, and which culminated in a decree in their favour in June, 1867. The mortgagee did take proceedings in 1867 to enforce and make good his charge upon the property upon the footing of this bond; a decree for sale was made; and under that decree of sale the present Plaintiff, an entire stranger to all the before-mentioned proceedings, bought in August, 1869.

"The result of this purchase is, I think, that the present plaintiff became entitled by virtue of the title initiated by the bond of June, 1866, to as much of the property as *Najmooddin* himself as heir could pass, provided the terms of the bond extended to that length."

C. W. Arathoon, for the Appellants, contended that, according to Mahomedan law, *Najmooddin*, as heir to *Khorshed Ali*, was not entitled to his share of the inheritance until his father's debts were satisfied. His power to alienate did not arise until the debts were satisfied; otherwise the alienee took subject to the unpaid debts of the father. This was a mortgage by the heir and not a sale, and it related to the mokurruri right of *Najmooddin*, which he held not in his own right but benamee for his father. The doctrine of *lis pendens* applies as regards the alienation by

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Najmooddin. Moreover, the Respondent in any view of the case bought subject to the decree of the High Court of the 11th of June, 1868, which bound the estate, and had directed that the residue thereof should be divided "when all the debts due by the estate of *Khorshed Ali* shall have been paid and satisfied." He referred to *Macnaghten's* Principles of Mahomedan Law, pp. 59, 94, 275, 278. [*Graham* referred to *Mussamut Bebee Bachun* v. *Sheikh Hamid Hossein* (1).] *Mussamut Humeeda* v. *Mussamut Budlan* (2); *Unnopoorna Dossee* v. *Gunganarain Paul* (3).

Graham contended that *Greedhur Lall*, through whom the Respondent claimed, purchased the right and interest of *Najmooddin, bonâ fide* and without notice and for valuable consideration. The title of the Respondent to the right and interest of *Najmooddin* is superior to that acquired by the Appellants under the decree of the 11th of June, 1868, or otherwise. It has been attempted to distinguish between a mortgage and a sale and to rely on the doctrine of *lis pendens;* but the mortgage was prior to any proceedings taken by the widows. The son having possession of and title to the property mortgaged to the Respondent's vendor, and then it is contended that in consequence of what happened after that date the estate is charged with debt to the Appellants. Whether *Najmooddin* held benamee or not, the mortgagee believed that the son had the mokurruri from his father. The Appellants cannot take advantage of the fraud of *Khorshed* to oust the mortgagee. Assuming that the mokurruri as a benamee transaction would be set aside, then the property would become part of *Khorshed's* estate descendible to his heirs at his death. It was competent to the heir to aliene to a *bonâ fide* alienee without paying the debts. *Macnaghten's* texts are not to the effect that dower constitutes a lien; they are examined by *Macpherson*, J., in *Mir Mahar Ali* v. *Amani* (4); see also *Bibee Mehran* v. *Mussamat Kubiran* (5); *Mussamut Wahidunnissa* v. *Mussamut Shabrattan* (6). A lien for dower only arises where the estate has been expressly

(1) 14 Moore's Ind. App. Ca. 383.
(2) 17 Suth. W. R. 525.
(3) 2 Suth. W. R. 296.
(4) 2 Beng. L. R. 307; S. C. 11 Suth. W. R. 212.
(5) 6 Beng. L. R. 60.
(6) 6 Beng. L. R. 54.

hypothecated for that purpose; see *Ameeroonnissa* v. *Mooradoonnissa* (1); *Sayad Umed Ali* v. *Mussamat Saffiham* (2). Reference was also made to *Sugden's* Vendors and Purchasers [Ed. 1862] p. 655, to shew that by English law an alienation by the heir is good against specialty crediors.

Arathoon replied.

The second of these appeals was from a decree of the High Court (April, 1874) which reversed that of the Subordinate Judge of *Gya* (June 19, 1873). The questions arising were as to which of the contending purchasers at auction sales of the mouzah in suit which also was part of *Khorshed Ali's* estate, held in execution of different decrees against the same judgment debtor, was to have precedence over the others under the circumstances stated in the two judgments of their Lordships printed below.

The judgment of the High Court (*Phear* and *Morris*, JJ.) was as follows:—

"The final decree made by the High Court was put into the form of an ordinary administration decree, and directed *Najmooddin* to account for the property of *Khorshed Ali* which was in his hands, and also to pay over the value in money of such property of *Khorshed Ali* which had been in his hands and which he had misappropriated.

"I need hardly say that a decree of this kind directing the person in whose hands the property was to account for it in order that it might be applied to the purpose of discharging the debts due from *Khorshed Ali*, was a decree against that property, and operative to bind it in the hands of *Najmooddin*, and therefore of any other person who took from *Najmooddin* with notice of the decree, or under such circumstances as to make him affected by the doctrine of *lis pendens*.

"Now while these suits were pending, and after the Plaintiffs in these two suits had recovered the decree against the property in the hands of *Najmooddin* to the full extent of their claim, from the Court of first instance, namely, on the 13th of October, 1867,

(1) 6 Moore's Ind. App. Ca. 211. (2) 3 Beng. L. R., A. C. 28.

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Najmooddin affected to create a lien upon the particular property which is the subject of this suit, and which is part of the property of *Khorshed Ali* come to his hands as heir on the death of *Khorshed Ali*, by a specially registered money bond made in favour of *Abdool Aziz* the son of *Mahomed Wajid*, the first Defendant in the present suit. After the final decree which the High Court made in these suits on the 11th of June, 1868, *Abdool Aziz* obtained in the summary mode provided by the late *Registration Act*, a money decree upon the footing of the specially registered bond. This was on the 4th of August, 1868. And on the 7th of September following he attached the property which is the subject of suit, and which the specially registered bond itself purported to bind; and afterwards he sold the property so attached in execution of that decree to the Defendant No. 1, *Mahomed Wajid* his father.

"Now it seems to be quite clear upon the facts which I have stated that *Mahomed Wajid*, the first Defendant who purchased in execution of the decree upon the specially registered bond, at the best obtained a title to the property subject to the operation and effect of the High Court decree of the 11th of June, 1868, upon that property as being part of the property which constituted the assets of *Khorshed Ali* at that time in the hands of *Najmooddin*. But that was a decree in an administration suit directing *Najmooddin* to account for that property in order that it might be administered by the Court to meet the claims of the Plaintiffs in that suit and of other creditors of *Khorshed Ali*. I say that *Mahomed Wajid* at best took a title subject to the effect of this decree, because if the specially registered bond be taken as the root of his title it disclosed the fact of the existence of these two suits and expressly stated that the property the subject of the bond was thereby pledged for the purpose of raising money to enable *Najmooddin* to carry on the appeals in those suits; if not, then he obtained by his purchase only the right, title and interest of *Najmooddin* in the property whatever that might be.

"After the date when *Mahomed Wajid* purchased this property in the manner I have mentioned, the Plaintiff *Tayyuban* in execution, as it is said, of the High Court decree which she had obtained in her suit, caused the property which is the subject of this suit to be put up for sale. And at that sale the three principal Plaintiffs,

Zuhrun, Begum, and *Tayyubun*, purchased it. Now this was a sale which was effected by the Court which was charged with the duty of executing the decree of the High Court: and that decree, as I have already endeavoured to explain, was a decree for the administration of the assets of *Khorshed Ali* in the hands of *Najmooddin* at the time when the decree was passed for the purposes of therewith discharging his debts; and the property which is the subject of suit is admittedly part of those assets. This sale, therefore, was an act of the Court administering those assets of *Khorshed Ali* in respect of which the administration decree had already been pronounced. The effect of that sale must therefore be to pass such title to the property as could be given by the Court at the time when the decree was passed. And inasmuch as the mortgage deed upon which the Defendant's claim is based was made by *Ndjmooddin* pending the suit in which the administration decree against him was made, the Court could at the time when the decree was passed give a title free of that incumbrance, whatever the incumbrance in itself might otherwise be worth.

"And *Mahomed Wajid* cannot even claim the benefit of this incumbrance, such as it may be, because the summary decree in execution of which he made his purchase could not affect the property pledged, and all he could obtain under his purchase was the right and interest of *Najmooddin* as it stood at the time of the execution sale, *i.e.*, at a time when the High Court administration decree had been passed against him.

"It thus seems to be clear that the Plaintiffs have got a title to the property in suit which is prior to the title, if any, which the Defendants have set up; and therefore they are entitled to recover.

"It has been argued before us that when *Mussamat Tayyuban* took out the execution under which the sale to the Plaintiffs was effected, she was not probably entitled to do so according to the terms of the High Court decree; also that in carrying into effect the administration decree the assets ought to have been marshalled in such a way as would have left the property now in suit unsold. But these objections cannot be entertained in this suit. The Defendant had the opportunity of putting them forward in the execution proceedings of the administration suit, and we under-

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stand that he did so without success. And no ground has been suggested as between the present Plaintiffs and the Defendant *Mahomed Wajid*, upon which it would be inequitable that the Plaintiffs should be allowed to assert their title."

Leith, Q.C., and *Doyne*, for the Appellant, contended that the Plaintiffs' suits were, so far as their claims for dower were concerned, ordinary creditors' suits, and did not prevent *Najmooddin*, who was in possession during their pendency, from dealing as he did *bonâ fide* with his own interest in his father's estate. In other words, *lis pendens* merely would not operate against the validity of the mortgage. [SIR MONTAGUE E. SMITH:—The effect of *lis pendens* is that, pending litigation, the party shall not alienate: see *Metcalfe* v. *Pulvertoft* (1).] Reference was then made to *Campbell* v. *Delaney* (2); *Shah Enaet Hossain* v. *Syud Rumzan* (3). The Respondents could not in equity seek to oust one who was in legal possession, without shewing that their claim could not be satisfied out of other portions of the estate. [SIR MONTAGUE E. SMITH:—If this objection had been taken in the Courts below it could have been dealt with.] It was for the Respondents to prove their case and shew that they were entitled to follow the property in suit.

It is said that there were certain prohibitory orders in force at the time of the mortgage. The Appellants, however, contend that the only possible proceeding that can be specifically relied on by the Respondents is the order made under sect. 92 of Act VIII. of 1859, and the attachment made in September, 1868, both of which were prior to the mortgage: see *Ijoboo Sahoo* v. *Ramchurn Roy* (4).

Arathoon, for the Respondents, was not called upon.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The first of these appeals is from an order of a Division Bench of the High Court of *Calcutta*, passed on special appeal. The order is dated the 23rd of May, 1873, and modified an order of

(1) 2 V. & B. 200.
(2) Marshall's Rep. 509.
(3) 10 Suth. W. R. 216.
(4) 11 Suth. W. R. 517.

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the Judge of zillah *Gya*, dated the 27th of March, 1872, which last-mentioned order reversed that of the subordinate Judge, dated the 29th of July, 1871, and made in the Appellant's favour.

The suit was instituted by the Respondents to establish their titles as purchasers in execution of a decree obtained by them against *Najmooddin* of 14 annas of mouzah *Bhojepore* in mehal *Rewai Taturia*, in zillah *Gya*, and to recover possession thereof.

The suit was brought under these circumstances: *Khorshed Aly*, a Mahomedan of the Soonee sect, died in October, 1865. He left three widows, *Mussamat Zohrun*, *Mussamat Begum*, and *Mussamat Tayyuban*. He also left a son named *Najmooddin*, who it was contended was not the legitimate son of his father (but whose title has since been established in the suit), and a sister.

The son's title having been established as the legitimate son and heir of his father, the three widows became entitled under the Mahomedan law as sharers to one-eighth of the estate of their deceased husband, and the son *Najmooddin* to seventh-eighths of the estate. The son claimed the whole property under a mokurruri which he alleged had been granted to him by his father on the 16th of March, 1862. The widows claimed large sums of money on account of dower; but on the 13th of June, 1866, before any proceedings had been taken by the widows to recover their dower, *Najmooddin*, the son, executed a mortgage bond in favour of *Situl Persad* for Rs.4890. The bond was dated the 13th of June, 1866, and was as follows:—"Whereas Rs.1295, under a bond dated the 14th of February, 1866, A.D., Rs. 1000, the principal amount under a registered bond, dated the 18th of May, *idem*, and Rs.118. 4*a*., the interest on the aforesaid two bonds, in all Rs 2413. 4*a*., are justly due to *Baboo Situl Persad*, son of *Baboo Ajoodhai Lal* 'mahajun' (banker), by caste an Agurwala, inhabitant of *Kusba Sahebgunge*, pergunnah and zillah *Gya*, from me the declarant; and at present having taken Rs.2386. 12*a*. in cash for payment of the rents of the mouzahs held in lease and mokurruri from the Ranis, the wives of *Rajah Modh Narain Sing*,"—referring to a mokurruri held by the father himself, as to a portion of the estate,—"hence cancelling the former bonds, I execute this bond for Rs.4800, and declare and give in writing, that I shall repay the said amount, principal, with interest at two

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per cent. per mensem, in full on the 30th of Magh, 1274" corresponding with 1867—"to the Baboo aforesaid. As a guarantee for the payment of the amount in question, I mortgage 8 annas of the entire 16 annas of mehal *Rewai Taturia*, pergunnah *Muhair*, zillah *Gya*, which I have as my property, and mokurruri in my possession and holding up to the date of the execution of this deed. As long as the amount in question, principal with interest, is not repaid, I or my heirs shall not transfer the same by sale, conditional sale, gift, or mortgage, or convey it in any other way to anybody else. Should I and they do so, the same will be null and void." Then at the end of the bond, "For the further satisfaction of the banker:"—that is, of *Situl*,—"I have kept a mokurruri pottah, dated the 16th of March, 1862, A.D., of the mehal mortgaged in this bond by the banker," meaning that he had deposited with the banker the mokurruri under which he claimed to hold the whole estate from his father.

Some question has arisen upon the construction of this bond, whether it was merely a mortgage of the mokurruri which he alleged to have held from his father, or whether it was a mortgage of his estate so far as he could charge it.

Their Lordships are of opinion that the mortgage operated to transfer his interest in the estate, and not merely the mokurruri which he alleged had been granted to him by his father. It is important to determine this question, because in a subsequent proceeding, to which advertence will presently be made, the mokurruri alleged to have been granted to him by his father was held to have been made merely benamee for the benefit of the father. The mortgage was on the 13th of June, 1866. At that time, if *Najmooddin* were the legitimate son of the deceased, —and it has now been decided that he was,—he had the right to convey his own share of the inheritance, and was able to pass a good title to the alienee, notwithstanding any debts which might be due from his deceased father.

For that position the 6th *Bengal* Law Reports, p. 54, was cited as an authority. In that case the share of an heir was seized and sold in execution of a decree against the heir in his individual and not in his representative capacity, and it was held that the purchaser had a right to hold the property against a creditor of the

ancestor who had obtained a decree for her debt before the seizure in execution. In that case the creditor was the widow of a deceased Mahomedan, and her claim was in respect of dower. The principle of that case is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personalty. In *Sugden* on Vendors and Purchasers, p. 655, the edition of 1862, it is laid down that, "although an heir-at-law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of any debts, was never holden to be subject to them." In *Williams* on Executors, at p. 872, a similar rule of law is laid down with regard to executors. It is said, "It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors into the hands of the alienee. The principle is, that the executor or administrator in many instances must sell in order to perform his duty in paying debts, &c., and no one would deal with an executor or administrator if liable afterwards to be called to account."

In the present case, in the course of the argument a distinction was attempted to be drawn by the learned counsel for the Appellant between an absolute sale and a mortgage; but it appears to their Lordships that there is no valid distinction in this respect. An executor may very properly mortgage a portion of the assets of his testator for the purpose of raising money to pay debts, and in many cases it may be very beneficial to the estate that such a course should be adopted.

In *Williams* on Executors, p. 873, it is said, "As an executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets."

In *Campbell* v. *Delaney* (1): "The heirs of a deceased Mahomedan mortgaged some property of their ancestor. After the mortgage

(1) Marshall's Rep. 509.

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a judgment creditor, in respect of a debt due from the estate of their ancestor, attached and sold the mortgaged property in execution of his decree. Held, that the sale was subject to the mortgage."

Their Lordships entirely concur in the view of the law which was laid down in the case cited from the 6th *Bengal* Law Reports, and the other authorities cited, and are of opinion that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law.

That being the law, it is necessary now to refer to what took place.

After the mortgage bond had been executed by *Najmooddin*, two of the widows, viz., *Mussamat Zohrun* and *Mussamat Begum*, instituted a suit against *Najmooddin*, and also against the sister of the deceased, who would have been entitled as an heir of the deceased in case *Najmooddin* was not a legitimate son. They sued to set aside the mokurruri under which the son claimed to be entitled to the whole estate from his father; to declare that he was a mere stranger; and they prayed for an order that possession of the estate should be recovered by them, and that the dower which they claimed should be paid out of the estate.

Lengthened proceedings took place in that suit, and ultimately on the 11th of June, 1868, the High Court, upon appeal by *Najmooddin* against whom a decree had been made in the lower Court, made the following decree: "That the Appellant is the legitimate son and an heir of *Khorshed Ali*, deceased; that the Appellant must account for the assets of the estate of *Khorshed Ali* which have come to his hands, and that to the extent of these assets he is liable to pay the amount due to the Plaintiffs *Zohrun* and *Begum* in respect of their dower, the said *Zohrun* and *Begum*, in respect of their claim, ranking *pari passu* with other ordinary creditors of the estate. When the debts due by the estate of *Khorshed Ali* shall have been satisfied, the residue is to be divided between the heirs, who are *Najmooddin* and the three widows *Zohrun*, *Begum*, and *Tayyuban*, in the shares to which they are by Mahomedan law entitled."

After the suit had been instituted by the first two widows,

Tayyuban, the other widow, brought a similar suit, and obtained a similar decree in the High Court. Under the decrees in the suits by the widows executions were issued, and the share of *Khorshed Ali* in the property in question, mouzah *Bhojepore*, was attached as part of the assets of their deceased husband.

On the 26th of June, 1867, *Situl Persad* sued *Najmooddin* on the mortgage bond, and obtained a decree in that suit, by which it was ordered that the sum due on the bond should be realized from the property mortgaged, and other property of the Defendant.

The present Respondent derived title under a sale of the mortgaged property in execution of that decree, and the High Court upheld his right to it. It should be remarked that several decrees and orders, both interlocutory and final, were made in the suits of the widows, and that the property in suit was attached in those suits long before it was attached in *Situl's* suit. But their Lordships consider that this is immaterial, and that it is unnecessary to refer to the several proceedings in the suits of the widows, because they are of opinion that the bond which was executed by *Najmooddin* to *Situl* gave him a title to the estate which had been mortgaged by the bond before the institution of the suits by the widows, and that the rights of *Situl* and of those who claim under the sale in execution of his decree are not affected by any of the proceedings in the widows' suits.

Their Lordships are of opinion that the decree of the High Court was correct, and they will humbly advise Her Majesty that the judgment and decree be affirmed and the appeal dismissed with costs.

The second appeal to which this judgment relates is similar to the preceding case instituted by *Bazayet Hossein* and others against *Dooli Chund*, with one exception.

The Appellant claimed under a sale in execution of a decree upon a mortgage bond executed by *Najmooddin* to *Abdool Aziz* on the 13th of October, 1867. The great distinction between this case and the other is that in the present case the mortgage bond was executed pending the suits brought by the widows, whereas in the other case the mortgage bond was executed before the institu-

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tion of the widows' suits. In this case the widows claim under a purchase in execution of the decree of the widow *Tayyuban*, the effect of which was stated in the judgment in the other appeal. The High Court held that the purchaser under the decree upon the mortgage bond was bound by the decree of the widow, inasmuch as the mortgage had been executed during the pendency of the widow's suit. Mr. Justice *Phear*, in delivering judgment, says, "I need hardly say that a decree of this kind, directing the person in whose hands the property was, to account for it in order that it might be applied for the purpose of discharging the debts due from *Khorshed Ali*, was a decree against that property, and operative to bind it in the hands of *Najmooddin*, and therefore of any other person who took from *Najmooddin* with notice of the decree, or under such circumstances as to make him affected by the doctrine of *lis pendens*."

Their Lordships agree in that view of the law, and are of opinion that the Appellant in this case was bound by the decree obtained by the widow *Tayyuban*.

A question was raised in the course of the argument as to whether the decree of the High Court warranted the execution which the widow took out; and whether some further order of the Court was not necessary before execution could be issued upon it. No application, however, was ever made to set aside the execution upon the ground that it was not warranted by the decree of the High Court, nor was any point of this kind taken in the Lower Court. Under these circumstances their Lordships are of opinion that that point cannot now be taken.

They, therefore, hold that *Abdool Aziz* and all persons claiming under him, or under the sale in execution of the decree upon his bond, were bound by the decree of the High Court in the suit instituted by the widows before the bond was executed.

Under those circumstances they will humbly advise Her Majesty to affirm the decision of the High Court and to dismiss this appeal with costs.

Solicitor for *Syud Bayazet Hossein: T. L. Wilson.*
Solicitors for *Dooli Chund: Watkins & Lattey.*
Solicitors for *Moulvie Mahomed Wajid: Barrow & Barton.*

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ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Act XXVI. of 1866—*Sub-Settlement*—"*Holding under Contract.*"

Under-tenures held under contract, or under any arrangements from which a contract may be inferred, are within the definition of sub-proprietary rights given in the rules annexed to Act XXVI. of 1866, and their holders are entitled to a sub-settlement.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (Feb. 12, 1875) affirming a decree of the Court of the *Fyzabad* Division of *Oudh* (Oct. 27, 1874), which had dismissed an appeal preferred by the Appellant against the order of the Settlement Officer of *Gonda* (June 13, 1874), and modified an order in favour of the Respondents on a cross appeal filed by them.

The question decided in this appeal was whether the Respondents were, under the rules scheduled to Act XXVI. of 1876, entitled to a sub-settlement for certain villages in respect of under-proprietary rights held under the Appellant. The nature of the case sufficiently appears in the judgment of their Lordships.

Cowie, Q.C., and *Graham*, for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

In this case the Settlement officer has found that the Respondents are entitled to a sub-settlement for certain villages in respect of under-proprietary rights held under the Maharajah of

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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Bulrampur. The Commissioner of *Fyzabad* has confirmed that finding; and upon appeal to the Judicial Commissioner, he saw no reason to disturb it.

The question turns upon the construction of Act XXVI. of 1866, and the rules, which have the effect of legislative rules, scheduled in that Act.

It appears that the Raj of *Bulrampur* is a large and ancient estate, and that these Respondents have held the villages—a part of that large Raj—for a very considerable period of time. The documentary evidence shews that they have been in possession from at least as early as the year 1771. Mr. *Cowie* admits that they held as sub-tenants; that there was an under-tenure under which they legally held the villages; and the only question is whether they held so as to bring their under-tenures within the definition of sub-proprietary rights given in the rules annexed to Act XXVI. of 1866.

The rules are not very clearly worded, but they seem sufficiently clear to enable a plain decision to be given in this case. Rule 2 says, "To entitle a claimant to obtain a sub-settlement he must shew that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." It is not necessary to inquire what "the period of limitation" means, for no question of limitation arises. The important part of Rule No. 2 is, "He must also shew that he, either by himself or by some other person or persons from whom he has inherited, has by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favour of the talookdar, held such lands under contract (pucka) with some degree of continuousness since the village came into the talooka." "Some degree of continuousness" is a vague phrase, but No. 3 supplies a definition of it. Rule No. 3 is, "The words 'with some degree of continuousness' will be interpreted as follows: If the village was included in the talooka before the 13th of February, 1836"—and this village falls within that category—"the lease must have been held for not less than twelve years between that date and the annexation of the province." Undoubtedly, if there was a holding under contract in this case, the

necessary degree of continuousness has been satisfied; and the only question is, whether or no there was sufficient evidence that these lands were held "under contract (pucka)."

Mr. *Cowie* has referred to some of the documentary evidence which appears to shew that they were held under what are called leases. The Settlement Officer has found that that holding was, within the meaning of these rules, a holding under contract. Their Lordships think, supposing the evidence supports his finding as to the lease, and being confirmed by the Commissioner they are not disposed to look too narrowly at the facts, that in point of law the decision is correct. The terms "holding under contract" embrace any holding under arrangements from which a contract may be inferred. Then the Settlement Officer has found that the land was not granted "on account of service or by favour of the talookdar."

Their Lordships having looked at the judgments of the Settlement Officer and of the Commissioner of *Fyzabad*, have observed that both those officers took very considerable pains to arrive at a correct conclusion in this case; and their Lordships see no reason whatever to suppose that they have not come to a correct decision.

Their Lordships will therefore humbly advise Her Majesty to affirm the decrees appealed from, and to dismiss this appeal.

Solicitors for the Appellant: *Watkins & Lattey.*

J. C.* JOY NARAIN GIRI . . . . . PLAINTIFF;

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Nov. 19. AND

GRISH CHUNDER MYTI . . . . . DEFENDANT.

AND

JOY NARAIN GIRI . . . . . DEFENDANT;

AND

GRISH CHUNDER MYTI . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Mitakshara Law—Partition.

Although a suit does not actually in terms seek a partition, yet if it indicates a distinct intention, and the decree gives effect thereto, of obtaining a separation in estate, such decree effects a partition, at least as regards the joint title.

Appovier v. *Rama Subba Aiyan* (1) approved.

THIS was a consolidated appeal from a judgment (April 25, 1876) of the High Court, and two decrees based thereon, dismissing appeals against a judgment of the Court of District *Midnapoor* (July 29, 1874), which dismissed the Appellant's suit with costs, and against a judgment of the same Court (July 27, 1874), which permitted execution of an order of Her Majesty in Council, made in a suit wherein one *Shibpershad Giri* was Plaintiff and the Appellant was Defendant.

On the 6th of March, 1866, one *Shibpershad Giri* sued the Appellant for the recovery of possession with mesne profits of a moiety of certain properties which he alleged were the joint and ancestral estate of himself and the Appellant, having been acquired by their grandfather, *Nund Kishore Giri*, from whom they had descended to them, and from which he asserted he had been ousted by the Appellant. The plaint filed in the suit contained no prayer for partition. The decree awarded possession of

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(1) 11 Moore's Ind. Ap. Ca. 75.

one moiety of the estate to *Shibpershad Giri*, with mesne profits. It contained no direction for the partition of the estate. It was affirmed by the High Court, and subsequently by the Privy Council.

Pending the appeal to the Privy Council *Shibpershad* died, and the Appellant applied that his widow should be substituted for him on the record, stating that she represented the estate of the deceased by right of heirship. The High Court, however, substituted the Respondent, who claimed to be entitled under *Shibpershad's* will. After the dismissal of the appeal to the Privy Council the Respondent endeavoured to execute the decree, and to oust the Appellant from one moiety of the estate.

Subsequently, on the 18th of July, 1873, the Appellant filed his plaint against the Respondent, *Grish Chunder*, who claimed under the said will, *Taramoni Dosi*, the widow of *Shibpershad*, and also against the daughter and mother of *Shibpershad*, alleging that there had been no partition of the estate and effects, and that the will under which *Grish Chunder* claimed had never been executed, and was inoperative even if it had been executed. He prayed that it might be set aside, and that he might be declared heir by survivorship to the moiety of the ancestral estate, and for possession; and in the event of a separation in estate being held to have taken place between himself and *Shibpershad Giri*, he might be appointed manager.

On the 29th of July, 1874, the Judge decided that *Shibpershad* did separate his property from that of *Joy Narain*.

On the 27th of July, 1874, the Judge ordered in the execution proceedings that the Respondent be allowed to proceed in execution of the decree made in *Shibpershad's* suit, holding that he fully represented the original decree holder.

Appeals were presented to the High Court against the decree of the 29th of July and the order of the 27th of July; and both were dismissed with costs.

Cowie, Q.C., and *Graham*, for the Appellant, contended that there was no intention on the part of *Shibpershad Giri* to effect a separation from the Appellant; and even if he had such intention, howsoever manifested, it did not under Mitakshara law

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constitute or effect legal separation in estate. The decree in *Shibpershad's* suit contained no direction for the partition of the estate, and would have been fully satisfied by the putting of *Shibpershad* into possession jointly with the Appellant, and the payment of the mesne profits awarded to him thereby. Reference was made to *Appovier* v. *Rama Subba Aiyan* (1), which overruled *Badamoo Koer* v. *Wazeer Singh* (2); *Sheo Dyal Tewaree* v. *Indoonath Tewaree* (3); *Mussumat Vato Koer* v. *Rowshun Singh* (4); *Debee Pershad* v. *Phool Koeree* (5); *In re Mussumut Phuljhari Koer* (6).

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The facts necessary to the understanding of this case are as follows:

Joy Narain Giri and *Shibpershad Giri* were grandsons of *Nund Kishore Giri;* they were joint in estate, and between them had the whole interest in the estate inherited from their grandfather. *Shibpershad Giri*, in consequence of his cousin *Joy Narain* refusing to allow him any participation in this joint estate, left the house in which they had jointly resided, went to reside with the husband of his sister, and had to maintain himself for some time by moneys which he borrowed. Under these circumstances he brought an action against *Joy Narain*, in which he alleged that *Joy Narain* had expelled him from the joint family, and that he sued to recover possession of his eight annas share of all the joint properties, both real and personal, with mesne profits and interest from the date of dispossession. In that suit he obtained a decree the material part of which is in these terms, "The Court orders that the half of the various properties which, as stated above, are in the possession of *Joy Narain* be decreed to the Plaintiff; that the date of separation from commensality is to be reckoned from the month of Bysack of the year 1272, and that from that date to

(1) 11 Moore's Ind. Ap. Ca. 75, 98.
(2) 5 Suth. W. R. 78.
(3) 9 Suth. W. R. 61.
(4) 8 Suth. W. R. 82.
(5) 12 Suth. W. R. 510.
(6) 12 Beng. L. R. 385.

the date of obtaining possession he is to get the mesne profits of the immoveable properties according to what will be ascertained in execution of decree; that with regard to the household chattels, &c., the Plaintiff is to obtain half of what the Defendant has admitted; that the Plaintiff is to obtain half of the proceeds of the pledged properties which are sold for the realization of the government rent, as well as half of the amounts of the decrees realized from the month of Bysack, 1272; that the Plaintiff is to obtain half of the proceeds of 12 solees and 4 bissees of paddy at the rate of Rs.26 per bissee, and that he is to obtain half of all the properties mentioned in the said decree."

From that decree of the Subordinate Court there was an appeal to the High Court of *Calcutta*, which confirmed the decree. After the confirmation of that decree by the High Court, and pending an appeal by *Joy Narain* to Her Majesty in Council, *Shibpershad Giri* died; and thereupon *Joy Narain* applied for his widow to be substituted for him in the suit as Respondent in the appeal. The Courts in *India*, however, gave effect to a will—which had been made by *Shibpershad Giri* some short time probably before his death, in which he gave all his property to *Grish Chunder Myti*, the son of his sister—and made *Myti* the Respondent. The appeal came on in 1873 before Her Majesty in Council, whereupon Her Majesty, by the advice of this Board, affirmed the decree of the High Court of *Calcutta*. Upon this, *Joy Narain* commenced the present suit, in which in effect he alleges that he and *Shibpershad Giri* having been joint in estate, and there having been no separation between them, the decree enured for his benefit, and that he, as the heir of *Shibpershad Giri*, was entitled to the whole of the joint property; there was also an alternative prayer that if that were not so he might be appointed as manager; and he sought, among other things, to set aside the will of *Shibpershad Giri*. Pending this present suit, *Grish Chunder Myti*, who, as substituted Respondent, had obtained the judgment of this Board affirming the decree in the previous suit, applied for the execution of that decree in 1874; whereupon *Joy Narain* objected upon the ground which he raises in this suit, namely, that the former suit really enured for his benefit, and that *Grish Chunder Myti* took no right under it; he also alleged, among other objections, the pendency

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of the suit which he had already brought. The Courts in *India* allowed *Grish Chunder Myti* to execute the decree; and the second appeal, which we have now before us, is from the High Court allowing the execution of that decree.

It appears manifest from this statement of the case that the questions in both appeals are substantially the same. The real question in the cause is, whether there was a separation of estate between *Joy Narain* and *Shibpershad Giri*.

Their Lordships regard the conduct of *Shibpershad Giri*, when he left the house in which both he and *Joy Narain Giri* lived, and withdrew himself from commensality with his cousin, as indicating a fixed determination henceforward to live separately from his cousin, and they treat the fact of his borrowing money for his separate maintenance—as well as his making a will—as indicating, at all events, that he himself considered that a separation had taken place. His plaint indicates that he accepts what he terms the expulsion of his cousin from the joint family, and claims the share to which he would be entitled after that expulsion, and after a separation. But further, it appears to their Lordships that the decree which has been read is in effect to give to *Shibpershad Giri* a separate share of the property of the grandfather. It gives him in terms possession of the 8 annas which he claimed of the real estate; it gives him mesne profits from the day of the alleged separation,—that is, from the time when he left the house in which he had been living with his cousin,—and it gives him also a half of the personal property. That being so, their Lordships are of opinion that although the suit is not actually in terms for a partition, yet that the decree does effect a partition, at all events, of rights which is effectual to destroy the joint estate under the doctrine laid down in the case which has been quoted of *Appovier* v. *Rama Subba Aiyan* (1).

Their Lordships think it necessary to say that they do not regard their decision in this case as conflicting with a case which has been called to their attention of *Debee Pershad* v. *Phool Koeree* (2). The suit in that case is described by Mr. Justice *Kemp* as a suit by *Debee Pershad* for a declaration of his right to a share in the estate of his grandfather *Deen Dyal*. Such a suit would not be

(1) 11 Moore's Ind. Ap. Ca. 75. (2) 12 Suth. W. R. 510.

inconsistent with an intention on the part of *Debee Pershad* to obtain a declaration of his being entitled to a joint interest in a joint estate; but here, for reasons already given, their Lordships regard the plaint as of a totally different character, indicating a distinct intention, to which effect is given by the judgment, of obtaining a separation of estate, and as regards both the real and personal property.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and they will humbly advise Her Majesty that that judgment be affirmed, and that both appeals be dismissed.

Solicitors for the Appellant: *Watkins & Lattey.*

SAHIBZADA ZEINULABDIN KHAN . . DEFENDANT;

AND

SAHIBZADA AHMED RAZA KHAN, AND OTHERS . . . . . } PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Act VIII. of 1859, *sect.* 119—*Right of Appeal from Decree obtained ex parte.*

In sect. 119 of Act VIII. of 1859, the words "no appeal shall lie from a judgment passed *ex parte* against a Defendant who has not appeared," relate to the case of a Defendant who has not appeared at all in the suit, and not to a Defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned.

APPEAL from a decree of the High Court (August 26, 1875) which dismissed an appeal from an order of the subordinate Judge of *Moradabad* (April 8, 1874).

The ground of such dismissal was that the last mentioned order having been obtained *ex parte*, no appeal lay to the High Court, and that the Appellant's remedy was to follow the procedure prescribed by sect. 119 of the Civil Procedure Code.

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The judgment of the High Court was as follows:—

"The suit was instituted on the 14th of September, 1872, and after much delay, owing to the residence of both parties in foreign territory, the hearing was, at the request of the pleaders of both parties, adjourned for the 5th of January, 1873, issues were framed, and October the 28th fixed for the hearing; the suit was not called on that date, but on the 7th of November, 1873. It was again adjourned at the like request to the 2nd of February, and subsequently to the 8th of April. On the 6th of April the Defendant Appellant submitted a petition praying for a further adjournment, on the plea that his pleader had gone to *Calcutta* to consult the Advocate-General, and could not return in time. This petition was not presented by a pleader nor by any duly authorized agent, and was rejected. On the 7th of April the Defendant's pleader telegraphed to the Subordinate Judge, requesting him to postpone the hearing. The Subordinate Judge refused to consider this irregular application, and on the 8th of April the case was called on in due course. Although the Defendant had an agent in *Moradabad*, no other pleader than *Ganesh Pershad*, who was absent in *Calcutta*, was appointed, and the Defendant appearing neither in person nor by pleader, on the 8th of April the case was heard and decided *ex parte* under the provisions of sects. 147 and 111. The Appellant subsequently took the proper step of applying to the Subordinate Judge, under sect. 119, for an order to set aside the judgment, but unfortunately he did not proceed with that application, and it was struck off for default, the Appellant being advised by his counsel to proceed by way of appeal. He is met by the objection that the appeal does not lie, as the judgment was passed *ex parte*. The Appellant's counsel urges that the case was not heard by the Subordinate Judge *ex parte* under sect. 111, that the default of the Appellant was such a default as is contemplated in sect. 145, and not such a default as is contemplated in sect. 147. It appears clear to us that the former section applies where the parties appear, but either of them fails to proceed with the case, while sect. 147 applies to cases like the present, in which at an adjourned hearing a party failed to appear. If the Judge heard the suit at all in the absence of the Appellant, he could only do so under the provisions of sect. 111. Having the option of

proceeding with the hearing, or again adjourning the case, he proceeded to hear and determine it.

"Then it is contended that the Appellant was entitled to proceed either by way of appeal or by an application under sect. 119, and *Kali Churn Dutt* v. *Modhoo Soodun Ghose* (1) is relied on, but that ruling has not apparently been followed in *Administrator General of Bengal* v. *Lala Dyaram Dass* (2), and in *Purus Ram* v. *Jyuntee Pershad* (3) it has been held that no appeal lies.

"The omission to follow the procedure required by sect. 119 has deprived the Appellant of all remedy. The appeal must therefore be dismissed with costs."

Leith, Q.C., and *Arathoon*, for the Appellant, contended that sect. 119 of Act VIII. of 1859 only applied to cases where the Defendant had entered no appearance in the suit at all: see *Macpherson's* Civil Procedure, p. 126. [SIR JAMES W. COLVILE referred to sect. 147.] There is a sensible distinction between the case of a Defendant not appearing at all, and the case of his appearing, putting in his defence, but absenting himself from the final hearing. [SIR MONTAGUE E. SMITH:—In the one case the Judge may decide on default; in the other the case must be proved. SIR ROBERT P. COLLIER:—It is against policy to allow a Defendant to lie by in the first Court, and then dispute the case in the second Court.] Sect. 147 does not apply, for it relates to preliminary hearings and adjournments from first hearings. Reference was made to *Goluckbur* v. *Bishonath Gearee* (4); *Gorachand Goswami* v. *Raghu Mandal* (5); *Amritnath Jha* v. *Baboo Roy Dhunpat Sing Bahadoor* (6). [SIR JAMES W. COLVILE:—If he proceeded under sect. 148, there are two clear decisions of the *Madras* High Court that sect. 119 will not apply; see notes to *Broughton's* Civil Procedure Code, sects. 147 and 148.] By the general law the Appellant has a right of appeal, and it has not been taken away. See *Kali Churn Dutt* v. *Modhoo Soodun Ghose* (1). They distinguished the case of *Administrator General of Bengal* v. *Lala Dyaram Dass* (2), and admitted that *Purus Ram* v. *Jyuntee Pershad* (3) was against them.

(1) 6 Suth. W. R. 86.
(2) 6 Beng. L. R. 689.
(3) N. W. P. Rep. (1869), 59.
(4) Marshall's Rep. 32.
(5) 3 Beng. Law Rep. App. 121.
(6) 8 Beng. Law Rep. 44.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The question in this case is whether the first part of sect. 119 of Act VIII. of 1859 applies to a case which has been decided under the provisions of sect. 147 of the same Act. That part of sect. 119 is in the following words: "No appeal shall lie from a judgment passed *ex parte* against a Defendant who has not appeared." Sect. 119 must be read together with sects. 109, 110, and 111. Sect. 109 says: "On the day fixed in the summons for the Defendant to appear and answer, the parties shall be in attendance at the Court House in person or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day which shall be fixed by the Court." Sect. 110 says: "If on the day fixed for the Defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned, neither party shall appear either in person or by a pleader when duly called upon by the Court, the suit may be dismissed." There the words are "If on the day fixed for the Defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned." Then comes sect. 111, which says: "If the Plaintiff shall appear in person;"—it does not say "on the day fixed, or on any subsequent day," but simply "If the Plaintiff shall appear in person or by a pleader, and the Defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex parte*." Sects. 109 and 111, taken by themselves, clearly relate to the appearance of parties and to their non-appearance at the first hearing of the suit. The 146th and 147th sections are enactments relating to adjournments. Sect. 147 enacts that "If on any day to which the hearing of the suit may be adjourned, the parties, or either of them, shall not appear in person or by pleader, the Court may proceed to dispose of the suit in the manner specified in sect. 110, sect. 111, or sect. 114, as the case may be, or may make such other order as may appear to be just and proper in the circumstances of the case." There is no enactment in that section that, in case the Court disposes of the suit in the manner specified in sect. 111 (the section which applies

to the present case), the first part of sect. 119 shall apply to such a judgment. Under Act VIII. of 1859, the general rule is that an appeal lies to the High Court from a decision of a civil or subordinate Judge, and a Defendant ought not to be deprived of the right of appeal, except by express words or necessary implication. Looking at all the sections together, their Lordships are of opinion that the words "who has not appeared," as used in sect. 111, mean, "who has not appeared at all," and do not apply to the case of a Defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned.

There are several cases to that effect decided by the High Court in *Calcutta*. *Marshall's* Reports, p. 32; 3rd *Bengal* Law Reports, Appendix, p. 121; and 6th *Weekly Reporter*, p. 86.

Two cases were referred to by the learned Judges who decided this case,—a case in 6th *Bengal* Law Reports, p. 689, and one from the North-Western Provinces Reports of 1869, p. 59. Their Lordships have referred to those decisions. It appears to them that the case cited from the 6th *Bengal* Law Reports, p. 689, so far from being an authority in support of the decision of the High Court, is rather an authority against it. The case which is cited from the North-Western Provinces Reports of 1869, p. 59, is certainly in conflict with the several decisions in the High Court at *Calcutta* to which reference has been made, and which in the opinion of their Lordships were correctly decided.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court was erroneous, and that the case be remanded to the High Court to hear and determine the appeal. The Respondent must pay the costs of this appeal.

Agent for the Appellant: *T. L. Wilson.*

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